

FINAL STATEMENT OF REASONS:

This action amends provisions governing Contraband within the California Department of Corrections (Department). California Code of Regulations, Section 3006(c), is being amended to state that inmates shall not possess or have under their control any personal photos, magazines, drawings, or other pictorial format, which contains materials of a sexually explicit nature.

This regulation includes the description of sexually explicit materials. This regulation states that sexually explicit images that depict frontal nudity whether in the form of personal photographs, drawings, magazines, and/or pictorials shall be considered as contraband and that inmates shall not be allowed to possess such materials. This regulation further describes sexually explicit materials as material that depicts frontal nudity of either gender, including the exposed female breast(s) and/or the genitalia of either gender.

Sexually explicit letters, articles, and photographs of clothed person(s) are not included in the regulation and will be allowed. Departmentally purchased or acquired educational, medical/scientific, artistic materials such as books or guides purchased by the Department for inclusion in institution libraries and/or educational areas will be allowed. Additionally, inmates shall be allowed to purchase or possess materials, including, but not limited to anatomy medical reference books, general practitioner reference books or guides, National Geographic or artistic reference material depicting historical, modern, and/or post modern era art, if these materials are approved by the institution head or their designee on a case-by-case basis.

This regulation will aid in the legitimate penological interests of maintaining the safety and security of the prisons, rehabilitating inmates, reducing sexual harassment of correctional officers and preventing a hostile work environment. Sexually explicit materials, within the institutions, have contributed to an increase of verbal assaults and have lead to intimidation of female correctional staff when attempting to perform cell searches. Inmates subject female correctional staff to a daily barrage of unwarranted sexual advances, thus causing an uncomfortable working environment and continued confrontation with inmates. Additionally, unrestricted access to sexually explicit material could lead to bartering between inmates and anatomical comparisons could lead to fights between inmates thereby jeopardizing the safety of prison staff and other inmates.

A recent 9th Circuit Court decision (*Mauro v. Arpaio*, 188 F.3d 1054, 9th Cir. 1999) upheld the constitutionality of a correctional policy prohibiting prisoners from possessing sexually explicit materials that showed frontal nudity of either gender, including the exposed female breast(s) and/or the genitalia of either gender, because the policy was reasonably related to a legitimate penological interest. The Department contends that inmates retain alternative means of exercising their constitutional right to receive sexually explicit communications, since these regulations do not prohibit sexually explicit letters nor does it prohibit sexually explicit articles or photographs of clothed persons.

Subsections 3006(a) through (c)(16) are unchanged.

New subsection 3006(c)(17)(A) and (B)(1) and (2) is adopted to state that sexually explicit images that depict frontal nudity whether in the form of personal photographs, drawings, magazines, and/or pictorials shall be considered as contraband and that inmates shall not be allowed to possess such materials. This regulation further describes sexually explicit materials as material that depict frontal nudity of either gender, including the exposed female breast(s) and/or the genitalia of either gender. This regulation allows departmentally purchased or acquired educational, medical/scientific, artistic materials such as books or guides purchased by the Department for inclusion in institution libraries and/or educational areas. Additionally, inmates shall be allowed to purchase or possess materials, including, but not limited to anatomy medical reference books, general practitioner reference books or guides, National Geographic or artistic reference material depicting historical, modern, and/or post modern era art, if these materials are approved by the institution head or their designee on a case-by-case basis.

The Department contends that prohibiting sexually explicit materials that show frontal nudity is aimed at the legitimate interest of maintaining prison security, rehabilitating inmates, and reducing sexual harassment.

The Department also contends that reducing violence and aggression toward female staff, and protecting the safety of departmental staff at the institutions, in general, is a legitimate interest, and that reducing sexual harassment and not allowing a hostile work environment in particular, likewise is legitimate.

Subsections 3006(d) is unchanged.

DETERMINATION:

The Department has determined that no alternative considered would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected persons.

ASSESSMENTS, MANDATES AND FISCAL IMPACT:

This action will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand businesses in the State of California.

The Department determines this action imposes no mandates on local agencies or school districts; no fiscal impact on State or local government, or Federal funding to the State, or private persons. It is also determined that this action does not affect small businesses nor have a significant adverse economic impact on businesses, including the ability of California businesses to compete with businesses in other states, because they are not affected by the internal management of State prisons; or on housing costs; and no costs or reimbursements to any local agency or school district within the meaning of Government Code Section 17561.

PUBLIC HEARING COMMENTS:

Public Hearing: Held December 18, 2002 at 9:00 a.m.

No one commented at the Public Hearing.

SUMMARIES AND RESPONSES TO WRITTEN PUBLIC COMMENTS:

COMMENTS #1:

Comment A: Commenter contends that she is opposed to this change. She contends that this rule change is a result of complaints by female correctional officers. Commenter contends that the female officers should be removed from male prisons. She also contends that this rule change is being made to avoid a lawsuit by the officers. She contends that female officers had a private agenda to file suit and retire. She states that the inmates and the California taxpayers will suffer as a result of these suits.

Accommodation: None.

Response A: Department contends that these regulations were filed to aid in the legitimate penological interests of maintaining the safety and security of the prisons. These regulations will also aid in rehabilitating inmates, reducing sexual harassment of correctional officers and prevent a hostile work environment. The Department contends that these regulations were not filed as a direct result of any specific lawsuit filed by female correctional officers. The Department also contends that inmates will not suffer, but will in fact be in a safer environment due to the fact that unrestricted access to sexually explicit material could lead to bartering between inmates and anatomical comparisons could lead to fights between inmates thereby jeopardizing the safety of inmates or prison staff. Additionally, the regulations do not restrict the rights of inmates to possess sexually explicit letters nor does it prohibit photographs of clothed persons. These regulations do not impact California taxpayers nor are they caused to suffer any repercussions due to these regulatory changes.

COMMENTS #2:

Comment A: Commenter contends that the Initial Statement of Reasons indicates that sexually explicit letters and articles will be allowed. He contends that it is unclear in the text of the regulations,

which is silent on this matter. He contends that the following example would be subject to the regulations: an article that is published in Time Magazine includes a photo of a Picasso painting that has an image of an exposed female breast. He contends that under these regulations, he could only possess that article if it were approved by the institution head or their designee on a case-by-case basis. He contends that leaving such a decision to the discretion of staff is very different from saying that such material will be allowed.

Accommodation: None.

Response A: Department contends that the regulations do not address sexually explicit letters and articles that do not contain photographs, drawings, magazines or other pictorial format. The Department contends that written text that is sexually explicit in nature will be allowed. These regulations specifically speak to “images” that are sexually explicit. In the example given by the Commenter of the Picasso painting of an image of an exposed female breast is addressed in 3006(c)(17)(B). If the material is departmentally purchased or acquired, it will be allowed; however, material as stated in (B)2., if purchased or possessed by inmates will be allowed on a case-by-case basis. Again, this applies to sexually explicit images, not written text such as letters and/or articles.

Comment B: Commenter contends that proposed regulations are in conflict with existing Section 3006(c)(15)(C)(1) and (3). He contends that these subsections specifically indicate that depictions, displays, or descriptions of “penetration of the vagina.... or contact between the mouth and the genitals,” on the one hand, and portrayals of “the nudity of a minor,” on the other hand, are subject to exclusion only if they meet the test for obscenity in Section 3006(c)(15). He contends that the conflict is twofold – 1) such depictions or portrayals are per se excludable under the new regulation but excludable under the “old” regulation only if they are in fact “obscene” and, 2) because “descriptions” are excludable under the old regulation yet purportedly not excludable under the new regulation.

Accommodation: None.

Response B: Department contends that sexually explicit material has a different meaning than that of sexually obscene material. Penal Code (PC) Section 311 provides the statutory definition of obscene material. As stated in 3006(c)(15), obscene material, taken as a whole, depicts or describes sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value. It further states that when obscene material appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it appeals to deviant sexual groups. Sexually explicit images are not obscene as defined in the PC and are not subject to the same test as obscene material.

COMMENTER #3:

Comment A: Commenter asks the question has there ever been a situation where a photograph, drawing, or advertisement showing frontal nudity jeopardized prison security or contributed to a prisoner’s escape?

Accommodation: None.

Response A: Department contends that the following information is being provided as a response to this question. To show rational relationship between challenged sexually explicit materials regulation and a legitimate penological interest, prison officials need not prove that banned material actually caused problems in the past, or that materials are “likely” to cause problems in the future, and it does not matter whether court agrees with the defendants or whether the policy in fact advances the prison’s legitimate interests. (*Casey*, 4 F. 3d at 1521) (US Court of Appeals, Ninth Circuit)

Comment B: Commenter asks the questions how does this restriction eliminate and reduce sexual harassment? She asks has there ever been a situation where sexual harassment was proven to be the direct result of an inmate previously viewing some form of frontal nudity and immediately harassing a correctional officer? She asks the question has there ever been a situation where a prisoner was successfully rehabilitated due to direct removal of any and all sexually explicit/frontal nudity material and whether the Department plans to “de-sex” every prisoner.

Accommodation: None.

Response B: See Commenter #3, Response A. Also, the Department contends that protecting safety of guards, and reducing sexual harassment in particular, are legitimate penological interests, for purposes of determining prison policy.

Comment C: Commenter contends that as a female officer in a hostile environment, she should either not enter or understand that if she is not able to stay in-charge of her situation, maybe she shouldn't have the job.

Accommodation: None.

Response C: See Commenter #3, Response A. Also, the Department is committed to providing a workplace in which all individuals are treated with respect and professionalism, and to provide a workplace that is free from all forms of discrimination and harassment, including sexual harassment. The Department contends sexual harassment is described as behavior that rises to the level of sexual harassment in violation of Title VII of the Civil Rights Act of 1964 and the Fair Employment and Housing Act. Additionally, departmental employees are afforded the right to apply for positions throughout the Department, and custody staff is subject to the post and bid process when applying for positions throughout the institutions/facilities.

Comment D: Commenter contends that she is a female and is interested in males. She states that she enjoys speaking with them and looking at them every day. She contends that this is the way she is made and that the Department cannot take that desire, pleasure or needs away from her. She states that she was born female and will die a female. She contends that one prime example for violence is the fact that prisoners are locked-up in a closet-type space with no sex, no sensual touching, no partners, de-sexed, for years. She contends that because she is an inmate that she has no rights to anything of life.

Accommodation: None.

Response D: Department contends that although the above comment/objection does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to the Government Code, the above comment is either insufficiently related to the specific action, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment. Also, protecting the safety of guards, and reducing sexual harassment in particular, are legitimate penological interests for purposes of determining constitutionality of particular prison policy.

Comment E: Commenter contends that she received a box from home from her 19-year old daughter with "nude playing cards" inside. Commenter states that she was denied these cards because they had pictures of men in frontal nudity." She contends that the Department is threatened by her possessing these cards and that it would be jeopardizing the security of the institution or that she might make a sexual advance towards staff. She contends that she is strongly against this regulation because it infringes on her right to be a feeling, caring, sexual female.

Accommodation: None.

Response E: See Commenter #3, Response D. Also, Department contends that inmates retain alternative means of exercising their constitutional right to receive sexually explicit communications, since these regulations do not prohibit sexually explicit letters nor does it prohibit sexually explicit articles or photographs of clothed persons.

COMMENTS #4:

Comment A: Commenter is requesting that a public hearing be held pursuant to Government Code Section 11346.8.

Accommodation: None.

Response A: Department contends that pursuant to Penal Code Section 5058.3 an emergency regulation adopted pursuant to "operational necessity" is valid for only 160 days. In order to make the emergency regulation permanent, the Department must fully comply with the notice requirements and other rulemaking procedures of the APA, including a public hearing, within the 160 days or the emergency language will be repealed by operation of law. (Gov. Code, Section 11346.1(e).)

Comment B: Commenter contends that he has a pending case in the US District Court for the Eastern District of California entitled James Michael Munro vs. David Tristan et. al., case number CIV-S-02-1559 GEB PAN P. He filed a motion to add defendants in this action. The Commenter is requesting that the Department suspend the Notice of Change to Directors Rules at this time.

Accommodation: None.

Response B: Department contends that in the hearing filed in Tuolumne County the Judge did not make any rulings. On December 16, 2002, the Judge took the issue and the pleadings under submission and will render a ruling some time in the future.

COMMENTS #5:

Comment A: Commenter contends that prison officials at Pelican Bay State Prison (PBSP) have, since the beginning of 2002, instituted a policy that bans any material, which contain frontal nudity. He contends that the Warden has directed staff to illegally deny or exclude prisoners from receiving publications and has established a list of banned magazines, which he contends violates prisoner's rights.

Accommodation: None.

Response A: Department contends that "local rules" issued by an individual warden that apply only to a particular institution, are not "regulations" pursuant to Section 5058, subdivision (c), and are not subject to the APA. Rules issued by PBSP since the beginning of 2002 regarding the ban of frontal nudity are considered "local rules."

Comment B: Commenter contends that the Warden at PBSP has pushed this policy to Sacramento and that the Chief Deputy Director has promulgated this policy as a statewide practice banning all frontal nudity throughout the entire CDC system. He contends that this is an underground and unenforceable and violate all prisoner's rights. He contends that this rule has been enforced before the staff at PBSP or CDC had the authority to do so and that it is unlawful to enforce.

Accommodation: None.

Response B: Department contends that regulations were duly adopted on September 30, 2002, pursuant to the APA (Title 1, CCR, Section 123, subd. (b)). The Director of the Department is authorized to enforce regulations filed pursuant to 5058.3.

Comment C: Commenter contends that this proposal does not pass constitutional muster let alone State law. He contends that the *Mauro* decision is arbitrary, and inmates should not be misguided by prison officials because of the misinterpretation of the application of the court decision. He contends that this regulation infringes upon, and violates prisoner's State and Federal rights. He contends that the Arizona jail policy was implemented where none had existed before and where they essentially had unlimited discretion to establish policies that as a matter of consequence, placed a valid restraint on jail detainees' First Amendment rights.

Accommodation: None.

Response C: See Commenter #3, Response A. Also, the Department contends that protecting safety of guards, and reducing sexual harassment in particular, are legitimate penological interests, for purposes of determining constitutionality of particular prison policy. The Department contends that this regulation is not unconstitutionally arbitrary or vague, since it sets out bright-line rule by excluding all materials, with the exceptions clearly defined in the text. Additionally, these regulations ensure consistency in the exclusion of materials. These regulations allow inmates to retain alternative means of exercising their constitutional First Amendment rights to receive sexually explicit material.

Comment D: Commenter contends that in upholding a regulation banning frontal nudity, the *Mauro* court cited an established rule that courts must give great deference to prison officials in promulgating rules for prison regulations. However, he contends that in the California penal system, statutes and regulations have long existed governing prisoner mail that essentially places "limit" on prison officials discretion in their ability to fashion rules regarding disallowing mail/publications, and which, he contends the courts have upheld or further defined such as what constitutes "obscene" publications. He contends that this is supported by decisions in *Miller v. California*, 93 S. Ct. 2607 (1973); *Pell v. Procunier*, 417 U.S. 817 (1974); *Thornburgh v. Abboit*, 104 Fed. 2d 459 (1989; and *Broulette v. Starns*, 161 F. Supp. 2d. 1021 (2002).

Accommodation: None.

Response D: Department contends that since regulations giving broad discretion to prison authorities were appropriate where regulations concerned materials coming into a prison, and moreover, the regulations actually grant little discretion to mailroom staff, who are simply required to determine

whether the material in question contain frontal nudity that is not allowed pursuant to the emergency regulations.

Comment E: Commenter contends that California prisoners maintain a statutorily created First Amendment Right to receive publications via the US Mail provided said magazines are not “obscene.” He contends that obscene was defined under *Miller*, and has since been codified under CCR, Title 15, Section 3006(c)(1)(15)(A)(B).

Accommodation: None.

Response E: See Commenter #2, Response B. Department contends that Staff shall not permit an inmate to send or receive mail which, in their judgment, has any of the characteristics listed in Section 3006(c). The staff shall consider the emergency regulations [Section 3006(c)(17)], which are in effect as of September 30, 2002.

Comment F: Commenter contends that CDC officials believe the Director’s rules allow them unrestricted authority to fashion and implement rules, practices or policies anyway they want regarding prisoner mail/publications, even if they are not in compliance with, contrary to, nor conform to already existing State law, properly codified regulations or other proper provisions of law. He contends that the State Legislature did not grant, or give any extensive power upon CDC to where they can make rules contrary to State law nor to define what’s “obscene” in a manner other than what’s been promulgated by the courts.

Accommodation: None.

Response F: See Commenter #2, Response B. Also, the Department contends that Penal Code (PC) Section 5054 vests with the Director the supervision, management and control of the prisons, and the responsibility for the care, custody, treatment, training, discipline, and employment of inmates. PC Section 5058 authorizes the Director to prescribe and amend regulations for the administration of prisons. PC Section 5058.3 authorizes the Director to adopt, amend, or repeal emergency regulations conducted pursuant to Government Code Section 11340.

Comment G: Commenter contends that CDC implemented a statewide Administrative Bulletin 02/04 regarding the Ban on Materials Displaying Frontal Nudity. He contends that this essentially revises or amends already existing codified regulations governing prisoner mail and property. He contends that the manner in which CDC went about this is contrary to the Office of Administrative Law’s Administrative Procedure Act. He contends that CDC has been implementing and enforcing underground rules in violation of State law. He contends that even if these proposed regulations were to somehow get approved for implementation, they would still be illegal and unconstitutional as they violate Penal Code (PC) Section 2600 through 2601.

Accommodation: None.

Response G: See Commenter #3, Response A, Commenter #5, Response B. Also, Penal Code 2600 states a person sentenced to imprisonment in a state prison may during that period of confinement be deprived of such rights and only such rights, as is reasonably related to legitimate penological interests. The Department contends that protecting safety of guards, and reducing sexual harassment in particular, are legitimate penological interests, for purposes of determining prison policy.

COMMENTER #6:

Comment A: Commenter contends that CDC is in violation of State and Federal law. He contends that the right of prisoners to possess material outlined in this amendment is protected by the Supreme Court’s ruling in the case of *Miller v. California*, and guaranteed by PC 2601, which implements that definition as applying to prisoners’ rights in *Broulette v. Starns*.

Accommodation: None.

Response A: See Commenter #5, Response G.

Comment B: Commenter contends that this amendment was illegally implemented as an “underground regulation” under the APA, prior to the filing as an Emergency Regulation on September 30, 2002. He contends that until such date, the “underground regulation” was not legally enforceable.

Accommodation: None.

Response B: See Commenter #4, Response A and Commenter #5, Response B.

Comment C: Commenter contends that prior to the adoption of this amendment, Title 15, Section 3006(c) already included a ban on all sexually explicit material. He contends that this ban did not affect

the possession of material depicting frontal nudity, as frontal nudity per se is not necessarily sexually explicit or obscene. He contends that sexually explicit and obscene material is clearly defined in current policy as outlined in Section 3006(c). He further contends that although frontal nudity may be considered explicit, it is not necessarily sexual in nature, and therefore, not sexually explicit.

Accommodation: None.

Response C: See Commenter #2, Response B and Commenter #5, Response G.

Comment D: Commenter contends that the *Mauro v. Arpaio* case is not applicable to California prisons. Under PC 2601 prisoners are permitted and guaranteed the right to possess the material, which the amendment proposes to ban. He contends that this law is analogous to the same right Arizona State inmates (as opposed to county jail inmates in which the Ninth Circuit ruled against) possess pursuant to a court ruling. He contends that the *Mauro* ruling does not apply to Arizona prison inmates and certainly does not apply to California inmates. Therefore, he contends that this ruling cannot be utilized as a basis or justification for the CDC ban.

Accommodation: None.

Response D: See Commenter #5, Response G. Department contends that the Supreme Court, in *Thornburgh v. Abbott*, 490 U.S. 401, 417 n. 15, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989), approved a regulation that permitted a federal prison warden to exclude any specific publication after the warden determined that it was “detrimental to the security, good order, or discipline of the institution.” The Court further explained that it was circumscribed by the requirement that “no publication may be excluded unless the warden himself makes the determination.” The Director of the Department has designated authority to departmental staff to make such determinations.

Comment E: Commenter contends that he agrees with the CDC is seeking penological objectives of maintaining prison security, rehabilitating prisoners, reducing sexual harassment of both male and female staff, reducing violence and aggression toward female staff and reducing a hostile work environment by protecting the safety of departmental staff. However, he contends that he does not agree with violating the statutory and constitutional rights of prisoners when there is no rational justification to do so. He contends that a blanket ban of all publications that display even one bare breast, regardless of overall literary merit, is excessively intrusive; inflicting a mortal wound to the fundamental right of prisoners.

Accommodation: None.

Response E: See Commenter #3, Response A. Department contends that if material is departmentally purchased or acquired, it will be allowed; however, material, as stated in the regulation text (B)2., if purchased or possessed by inmates will be allowed on a case-by-case basis. This regulation is not a blanket ban on all publications.

Comment F: Commenter contends that the Department allows inmates to retain alternative means of exercising their Constitutional right to receive sexually explicit communications. He contends that this is not rational. He contends that the Department justifies its recognition of those rights by permitting prisoners to receive sexually explicit correspondence, yet it seeks to ban even non-sexual communications if accompanied by the slightest nude imagery. He contends that this amendment usurps the California Legislature by ignoring clearly established law.

Accommodation: None.

Response F: See Commenter #2, Response B and Commenter #5, Response F.

COMMENTER #7:

Comment A: Commenter contends that the amendments state that the Department will allow inmates to receive reading books, sexual letters and photographs of clothed persons, but he contends that the rules already stop these alternatives in 3006(c)(15)(A)(1) by the words “describes these sexual acts.”

Accommodation: None.

Response A: See Commenter #2, Response B.

Comment B: Commenter contends that what is in letters, photographs, or sexually explicit reading books, is left to the interpretation of the mailroom officer or which ever staff reviews the material.

Accommodation: None.

Response B: See Commenter #5, Response D. Also, Department contends that this regulation ensures consistency in the exclusion of materials.

Comment C: Commenter contends that these rules are contradictions and lies due to the fact that he has received unauthorized mail item notices from the mailroom that have notified him he has received sexually explicit correspondence which is considered contraband.

Accommodation: None.

Response C: See Commenter #7, Response B. Also, Department contends that the inmate may, pursuant to Section 3084.1, appeal any departmental decision, action, condition, or policy which they can demonstrate as having an adverse effect upon their welfare.

Comment D: Commenter contends that this rule change will only lead to a major lawsuit for violating people's rights, like in a Wisconsin Federal District Court, which he contends the Wisconsin Department of Corrections' was found in violation of enforcing a total ban on sexually explicit material.

Accommodation: None.

Response D: See Commenter #2, Response A and Commenter #5, Response E.

COMMENTER #8:

Comment A: Commenter contends that he has no real objection or authority (law) to support his disagreement to this regulation, just his personal thoughts, feelings, and common sense. He contends that he has spent over 15 years in prison and has never witnessed female staff being faced with a daily barrage of unwarranted sexual advancements, nor an increase of verbal assaults that have lead to intimidation of female staff when attempting to perform cell searches. He questions if mere photographs or nudity of another female intimidates female staff or creates a hostile working environment, how can CDC expect them to handle emergency situations. He contends that peers or co-employees not inmates create the hostile working environment.

Accommodation: None.

Response A: See Commenter #3, Response A, B and C.

Comment B: Commenter contends that for years there has been limited access to materials an inmate can receive and he asks what record of fights or violence over nudity does the Department show to support this.

Accommodation: None.

Response B: See Commenter #3, Response A.

Comment C: Commenter contends that playboy magazine is a form of art. He contends that he is an artist and on occasion draws the female nude form in good taste. He also contends that he respects female staff and would not be disrespectful to them in this manner. He contends that female staff may have had a bad experience in their work and that if the Department has the legal authority on its side then they should just say it's "law," but not make up all of the untruths about why the ban on nudity should take place at the expense of the inmates that are not in the habit of disrespecting staff.

Accommodation: None.

Response C: See Commenter #5, Response E, F and G.

Comment D: Commenter contends that there are very few inmates who show disrespect to female staff and he contends that that is why there are rules and disciplinary reports.

Accommodation: None.

Response D: See Commenter #3, Response A. Also, Department contends that Section 3312, will continue to be utilized regarding disciplinary methods for the prohibition of sexually explicit materials that show frontal nudity.

Comment E: Commenter contends that he is a lifer serving 25 years to life, and that it is the nude photographs, magazines that keep his sexual focus. The commenter asks if the Department takes that away, where does it go? He contends that he has several tattoos, and asks will the State pay for inmates to have them removed or covered because he does not wish to intimidate female staff with my nude tattoos.

Accommodation: None.

Response E: See Commenter #2, Response A, and Commenter #3, Response E. Also, the Department contends that tattoos are regulated under Section 3063, which states in part that inmates shall not remove or permit removal of tattoos from themselves or others. Furthermore, Section 3350.1 states that the Department shall not provide treatment for conditions that are cosmetic, specifically, pursuant to Section 3350.1(a)(3)(A).

COMMENTER #9:

Comment A: Commenter contends that the regulation will not aid in the legitimate penological interests of maintaining the safety and security of the prisons, rehabilitating inmates, reducing sexual harassment of correctional officers and preventing a hostile work environment. He contends that there is no true justification or reliable hypothetical way this regulation may help to maintain the safety and security of a prison.

Accommodation: None.

Response A: See Commenter #3, Response A, B and C.

Comment B: Commenter contends that rehabilitation is non-existent and there is no documented fact that it exists in the Security Housing Unit (SHU), or on many Mainlines.

Accommodation: None.

Response B: Department contends that rehabilitation during disciplinary detention, such as inmates who are enrolled in educational programs, may be permitted to possess textbooks while undergoing disciplinary detention. However, privileges generally associated with the inmate's work/training incentive groups (rehabilitation) will be suspended during a period of disciplinary detention. The Department also contends that pursuant to Section 3331, Conditions of Detention, inmates confined to designated disciplinary detention units, such as SHU, shall have the delivery or issuance of packages, publications and newspapers withheld during the duration of the detention.

Comment C: Commenter contends that there are already methods in place to deal with inmates that sexually harass an officer. He contends that nudity was not allowed on cell walls prior to this Ban, so the claim of intimidation of female officers when searching cells is unfounded. He contends that female officers sign up to work at a male prison knowing they will be subjected to some possible acts of sexual harassment by a certain class of inmates, ones who will not be deterred by the Ban on Nudity, but instead encouraged by it to further harass female officers.

Accommodation: None.

Response C: Department contends that the rules prohibiting the posting of nudity on cell walls at the local institutions is considered a "local rule." Local rules are issued by the individual warden, are not statewide, and are not subject to the APA. Therefore, it was the Department's intention to standardize regulations on a statewide basis, thus it was necessary to promulgate regulations. **Also, see Commenter #3, Response C.**

Comment D: Commenter contends that inmates are subjected to derogatory procedures daily, such as strip searches in front of female officers. He contends that their job requires them to view male genitalia and regulations force the inmates to comply. He also contends that CDC makes inmates strip completely nude in front of other inmates, within the eyes of many, this act would be a violation according to the new regulations of disallowing frontal nudity. He contends that if this regulation is implemented then CDC should revise their strip search policies.

Accommodation: None.

Response D: See Commenter #3, Responses C and D. Also, Department contends that pursuant to Department Operations Manual, correctional personnel shall not conduct unclothed body searches of an inmate of the opposite sex, except by qualified medical staff, or in the case of an emergency.

COMMENTER #10:

Comment A: Commenter contends that the regulations do not comport with Title 15, Section 3008 regarding Obscenity and provides the definition of obscenity. He contends that material which displays frontal nudity is not "substantially beyond customary limits" of publications. He contends that these types of pictures are commonly available and accepted by society and in accord with State and Federal constitutional protected speech. He contends that this regulation is a violation of constitutional and statutory law.

Accommodation: None.

Response A: See Commenter #2, Response B and Commenter #5, Response G.

Comment B: Commenter asks if the Department has consulted with the California Correctional Peace Officers Association about possible lawsuit against correctional staff over enforcing this issue or about the likely result of implementing this regulation?

Accommodation: None.

Response B: Department contends that the regulations were filed in compliance with the APA. Pursuant to the APA the Department must allow any person to submit written comments regarding the regulations. The Notice of Change to Director's Rules 02/10 was issued on October 1, 2002, which began the 45-day comment period for these regulations. A Public Hearing was held on December 18, 2002, which concluded the Public Comment Period. All comments are summarized and responded to in the Final Statement of Reasons.

Comment C: Commenter contends that the proposed language violates inmate's civil rights. He contends that according to PC 2601 inmates may receive non-obscene printed and pictorial materials. He contends that the definition of "obscene" must be the same under both Section 311 and 2601. He contends that Title 15, Section 3006 definition of obscene must be the same as that of PC 2601.

Accommodation: None.

Response C: See Commenter #2, Response B and Commenter #5, Response G.

Comment D: Commenter contends that the NCDR gives invalid, "unprovable" reasons for its "legitimate penological interest" rationale. He asks how CDC can prove that nude pictures rather than the inmate's pre-existing attitude lead to such acts. He asks if CDC has taken a poll of inmates regarding sexual harassment, or has CDC received documentation regarding misconduct due to viewing sexual materials? He contends that CDC has no interest in rehabilitation of inmates and that basic policy is either punishment for rules violations or bribery, such as canteen or package privileges. He contends that banning nudity is totally disconnected to promoting or reinforcing an inmate's day-to-day behavior or rehabilitation.

Accommodation: None.

Response D: See Commenter #1, Response A and Commenter #3, Response A. Department contends that pursuant to CCR, Article 3, Work and Education, inmates are obligated to work or participate in vocational, therapeutic, educational or other institution program assignment, while committed to the custody of the Director of Corrections.

Comment E: Commenter contends that if inmates have no form of individualized sexual gratification/release – outlets available to them, which do not involve other persons, then the likely effect will be more sexual harassments/assaults by way of compensation for that loss of such materials.

Accommodation: None.

Response E: See Commenter #3, Response D. Also, Department contends that inmates retain alternative means of exercising their constitutional right to receive sexually explicit communications, since these regulations do not prohibit sexually explicit letters nor does it prohibit sexually explicit articles or photographs of clothed persons.

COMMENTER #11:

Comment A: Commenter contends that he received a High Desert State Prison (HDSP) 3287(A)(2) from a correctional officer at HDSP stating after a cell search he confiscated and disposed of magazines depicting frontal nudity due to a memo banning frontal nudity. Commenter contends that this policy does not apply as to Title 15, Section 3006(A) and does not apply to PC 2600, now codified at 2601, PC 311, all forbade CDC from censoring frontal nudity publication like Playboy and Penthouse because the vast majority of pictures of frontal nudity are not "obscene." He contends that such magazines are available at bookstores and newsstands all over California even in waiting areas of airports run by the State. He contends that these publications do not violate contemporary statewide standards, thus are not "obscene." He contends that this policy is a violation of the US Constitution's First Amendment as far as freedom of speech and the 14th Amendment as far as due process.

Accommodation: None.

Response A: See Commenter #2, Response B, Commenter #5, Responses A and G.

Comment B: Commenter contends that this regulation is an attempt to usurp constitutional guarantees with no substantive proof or an allegation that *Mauro vs. Arpaijo* applies in this case. He contends that there is no cause of serious penological interests cited or referenced. He contends that this is an attempt to violate his civil rights and requests that this action be forwarded to the Director for review.

Accommodation: None.

Response B: See Commenter #3, Response A and Commenter #5, Responses C, F and G.

COMMENTER #12:

Comment A: Commenter contends that he has filed lawsuit with the Superior Court of Tuolumne County and Judge William Polley (included with the comment) and that the Judge has issued an Order Directing Issuance of Alternative Writ of Mandate and the Alternative Writ of Mandate and he contends that the Judge commands that the emergency regulation be cancelled “forthwith.”

Accommodation: None.

Response A: See Commenter #4, Response B.

Comment B: Commenter contends that the NCDR 02/10 is a duplicate of the “illegal” emergency regulation and that it is illegal according to the facts and documentation submitted in the above-mentioned lawsuit. Commenter is requesting that the regulation be withdrawn. He has also requested that if the hearing on December 18, 2002 is held, he would like to be notified so that he may formally have that regulation cancelled too.

Accommodation: None.

Response B: Department contends that NCDR 02/10 is not a duplicate of the emergency regulation filed with OAL, but is a requirement of the APA when an agency begins the process of promulgating regulations. The NCDR 02/10 consists of the Department’s informational cover sheet, the Notice of Adoption of Emergency regulations, the Text of the emergency regulations and the Initial Statement of Reasons. NCDR 02/10 is the official notification of the Public Hearing that took place on December 18, 2002. NCDR 02/10 was issued on October 1, 2002, which began the 45-day Public Comment Period as required by the APA. **Additionally, see Commenter #4, Response A.**

COMMENTER #13:

Comment A: Commenter contends that negative actions will result from this regulation. He admits that he is guilty of disrespecting myself and both male and female staff by exposing himself, not a magazine or photo as he contends the Department is misleading the public. He asks what really changes if the Department removes the material?

Accommodation: None.

Response A: See Commenter #1, Response A and Commenter #3, Response D.

Comment B: Commenter contends that the Department would be creating a hostile situation between cellmates because he contends that he is a lifer and the Department has taken his only source of sexual relief away, he asks whom does he turn to. He contends that he would turn to someone that he knows is weak and someone he could take his sexual frustration out on. The commenter also states that he would get a job in the kitchen and stake out a female staff member, he states he has limited options but that there will surely be a victim when it’s over. He contends that it will spread. He contends that there is a better way to control sexual harassment, but that this is not it.

Accommodation: None.

Response B: See Commenter #1, Response A and Commenter #3, Response D. Also, Department contends that these comments were taken as a threat and were forwarded for investigation by the appropriate Correctional Staff.

COMMENTER #14:

Comment A: Commenter contends that Section 3006(c)(17)(A) regarding the exposed female breast is objectionable and unnecessary. He contends that to provide a less hostile workplace for female employees due to an appellate ruling, the Department seeks to restrict sexually explicit material. He contends that defining the female breast as sexually explicit in the 21st Century is laughable and repressive.

Accommodation: None.

Response A: See Commenter #3, Response D.

Comment B: Commenter contends that the above-mentioned appellate ruling concerns office settings, not men's prisons. He contends that the courts define sexually explicit material as "matter that is designed or intended to arouse prurient interest in a majority of the general public. He contends that sexually is defined as an adjective for sex, the sexes or relations between them and that explicit is defined as stated in detail or definite. He contends that sexually explicit implies aroused sexual organs and/or paraphernalia depicting or in use of same. He asks how can the female breast even be considered a sexual organ much less an aroused one? He contends that the female breast is not in any modern sense associated with inciting any lewd, lurid or perverted acts. He contends that Mainstream Media depict and expose the female breast on national TV, clothing catalogs, in legitimate theater, etc.

Accommodation: None.

Response B: See Commenter #5, Responses C, D, and G.

Comment C: Commenter contends that the portion of the text "the exposed female breast" is too broad and is therefore subject to interpretive definition as to what constitutes exposed. He contends that it could be the full frontal totally bare with nipples visible or it could be 50% bare or it might be extreme cleavage or sheer fabrics. He contends that this subjects inmates, publishers and correspondents to First Amendment violations and censorship from overly zealous, religious and/or morally repressed CDC staff.

Accommodation: None.

Response C: See Commenter #5, Responses E, F, and G.

Comment D: Commenter contends that this regulation will vary widely between institutions and whatever mailroom staff member is on duty. He contends that material may be declared contraband at the whim of any CDC staff member during any search and selectively enforced.

Accommodation: None.

Response D: Department contends that prior to the filing of the emergency regulations, local rules were issued by each warden, thus the Frontal Nudity policy varied from institution to institution. Department contends that emergency regulations were filed and were in effect on September 30, 2002. These regulations ensure consistency in the exclusion of materials. **Also, see Commenter #5, Response D.**

Comment E: Commenter proposes substitute language, which could include "the exposed genitalia of either sex in an aroused state" (Hustler vs. Playboy), or "may not be prominently displayed in inmate living or work areas." He contends that this would be more definite, fitting and to the point. He contends that this language would be less subject to potential abuse while being consistent with the Court's stated goals.

Accommodation: None.

Response E: Department contends that the commenter's proposed substitute language is regarding obscene material, which is not allowed under current departmental regulations, as well as the Penal Code. **See Commenter #2, Response B, Commenter #5, Responses D, and G.**

COMMENTER #15:

Comment A: Commenter contends that the regulation is unnecessary, that the existing regulations adequately serve these interests and it will have the opposite effect than intended by the Department. He contends that the regulations fail to comply with the APA necessity requirement. Commenter contends that existing regulations satisfactorily promote the goals of maintaining the safety and security of the prisons. He contends that inmates are required to treat departmental staff respectfully, impartially, etc. and that inmates must obey all laws. He contends that inmates may not participate in illegal sexual acts and inmates may not possess obscene materials nor openly display pornographic images nor trade, barter, or give away personal property. He states that the Department may enforce these regulations through progressive administrative disciplinary methods. He also contends that the Department currently has no regulation, which prohibits inmates from making anatomical comparisons. He contends that if the allegation that "anatomical comparisons could lead to fights between prisoners" had merit then they would not require inmates to shower together or undergo strip searches in groups.

Accommodation: None.

Response A: See Commenter #1, Response A, Commenter #2, Response B and Commenter #5, Response B. Also, the Department contends that these regulations will be enforced through administrative disciplinary methods.

Comment B: Commenter contends that requiring inmates to adhere to archaic Victorian moral proscriptions against nudity, rather than the current community standards proscribing obscenity is contrary to the goal of rehabilitation. He contends that inmates should be prepared for eventual release to the community, where nudity is commonplace in magazines, adult nightclubs, cable television and even some community events.

Accommodation: None.

Response B: See Commenter #5, Response G. Department contends that prerelease classes are offered to inmates who are within 2-3 months of release. The curriculum prepares the inmate for release in the community. The class prepares them to fill out all types of paperwork regarding employment applications, ID cards, unemployment benefits, disability insurance, etc. Additionally, a parolee's conditions of parole may not allow them to frequent adult nightclubs, due to alcohol restrictions.

Comment C: Commenter contends that the Department is implying that the female guards are dissatisfied with their jobs because of the barrage of unwarranted sexual advances from male inmates, thus causing an uncomfortable working environment. He contends that inmates are confined in prison against their wills, are segregated from society, including the opposite gender and they have no sexual outlet. He contends that any reasonable person can foresee that some inmates will make sexual advances towards female prison guards and he contends that no reasonable person would expect employment as a prison guard to include a "comfortable working environment" free from confrontations with inmates.

Accommodation: None.

Response C: See Commenter #1, Response A, and Commenter #3, Response C. Department contends that inmates retain alternative means of exercising their right to receive sexually explicit communications, since these regulations do not prohibit sexually explicit letters nor does it prohibit sexually explicit articles or photographs of clothed persons.

Comment D: Commenter contends that the regulation fails to accomplish the Department's goals because it is eliminating the only safe and legal outlet for sexual interest shared by all inmates. He contends that some inmates will have conjugal visits with their wives, or receive sexually explicit letters. He contends that without sexually explicit images to look at, inmates will focus more "unwarranted" attention on prison staff. Commenter contends that the Department will be promoting homosexuality and an increase in sexual assaults against other inmates, because inmates will usually see no other nudity other than that of fellow inmates when showering or being strip searched by guards.

Accommodation: None.

Response D: See Commenter #3, Response D.

Comment E: Commenter contends that the fact that existing regulations already meet the Department's needs in maintaining prison security, rehabilitating inmates and reducing sexual harassment, bars the Department "by estoppels" from claiming that this regulations is required or necessary. He contends that the Department is failing to enforce existing regulations through the administrative disciplinary procedures. He contends that a reasonable alternative would be to enforce existing regulations.

Accommodation: None.

Response E: Department contends that existing regulations do not address sexually explicit material. Department also contends that existing regulations regarding contraband, sexual harassment, and inmate property are enforced through existing administrative disciplinary procedures.

Comment F: Commenter contends that female guards seem to be offended by sexually explicit images possessed by inmates during cell searches; however, he contends that female parole agents must encounter pornography when they search parolees' homes, as do probation and police officers, yet they cannot complain of a hostile work environment just because they are exposed to offensive materials while performing their jobs. He contends that a reasonable alternative would be for the Department to provide training to its prison guards to desensitize them to material, which they may

personally find offensive. He contends that female guards flirt with inmates, wear perfume, make-up or tight-fitting uniforms and thong underwear. He contends that the Department should provide training to staff concerning the heightened risk inmates would misperceive staff's actions as an invitation to make a sexual advance. He contends that female staff should be prohibited from wearing thong underwear; sleeveless tops, slit-dresses, form-fitting garments, or other sexually enticing clothing, applying make-up or perfume, and altering uniforms to make them appear more feminine and sexy.

Accommodation: None.

Response F: See Commenter #1, Response A and Commenter #3, Response C. Also, Department contends that all officers must adhere to a strict uniform policy and grooming standards pursuant to statewide departmental policy.

Comment G: Commenter contends that the regulation fails the "authority" standard of the APA. He contends that the informative digest fails to mention PC 2601, which is a specific statute guaranteeing particular rights to prisoners. He contends that a specific statute (PC 2601) controls a general statute (PC 5054). Since PC Section 2601(c) protects the right of prisoners to receive publications, subject to certain specified restrictions, he contends that the Department has no authority to alter the scope of the statute through quasi-legislative rulemaking. He contends that the Department does not have the authority to reclassify and treat inmates as if they were employees who are subject to workplace policies. Prisons are where prisoners reside, it is not their "workplace," it is their "home."

Accommodation: None.

Response G: See Commenter #3, Response C, Commenter #5, Responses B, E, F, and G. Also, Department contends that the Office of Administrative Law states that the Department met all APA standards pursuant to the filing of regulations, and duly adopted as a regulation pursuant to the APA (Title 1, CCR, sec. 123, subd. (b)).

Comment H: Commenter contends that the regulation fails to comply with the "clarity" standard of the APA. He contends that this regulation is unclear and not easily understood by those directly affected by it, including inmates, publishers, vendors, prison guards, and prison mailroom employees. He further contends that the regulation fails to define "nudity," and fails to explain what is meant by "exposed" when referring to female breast(s) or genitalia. He contends that this regulation could be interpreted to have several meanings, which would result in arbitrary and haphazard enforcement, contrary to APA standards. He asks questions regarding how much breast can be exposed without violating the rule; or if models wear transparent clothing, would that be considered nude; or is side or rear nudity with exposed breast(s) or genitalia exempt from the regulation? Also, he asks how would staff determine which sexually explicit drawings would inmates be allowed to possess?

Accommodation: None.

Response H: Department contends that the Office of Administrative Law states that the Department met all APA standards pursuant to the filing of regulations, and duly adopted as a regulation pursuant to the APA (Title 1, CCR, Section 123, subd. (b)). Also, see Commenter #5, Response C, D and E.

Comment I: Commenter contends that the use of "and/or" in "1 CCR 16(a)(4)" is grammatically incorrect.

Accommodation: None.

Response I: See Commenter #3, Response D.

Comment J: Commenter contends that the regulation fails to comply with the APA requirement that regulations be consistent with and not in conflict with existing laws. He contends that this regulation is inconsistent with PC 2601(c) in that prisoners are guaranteed the right to receive publications accepted for distribution by the US Postal Service, subject to specified exceptions. He contends that this regulation would restrict the right of inmates to receive non-obscene materials, and would expand the Department's power, thereby altering the statute. He contends that this regulation would restrict the right of prisoners to create art under PC 2601(a). He further contends that this regulation is unconstitutional and is in conflict with the Constitution, First Amendment and the California Constitution, Article I, Section 2 and is therefore invalid.

Accommodation: None.

Response J: See Commenter #5, Responses B, E, F and G.

Comment K: Commenter contends that the regulation fails to comply with the “reference” standard of the APA. He contends that the Department relied upon *Mauro v. Arpaio* when it drafted this regulation. He contends that the *Mauro* decision was the prime motivation and justification for the Department’s action.

Accommodation: None.

Response K: Department contends that regulations were duly adopted on September 30, 2002, pursuant to the APA (Title 1, CCR, Section 123, subd. (b)). The Office of Administrative Law reviewed the emergency regulations and found that the all APA required standards were met.

Comment L: Commenter contends that the Notice, Informative Digest and the Initial Statement of Reasons (ISOR) are deficient in that they fail to comply with the requirements of Chapter 3.5 of Title 2 of the Government Code. He contends that the ISOR fails to cite any document, report or study on which the Department relies in proposing this amendment (GC 11346.2(b)(3)). He contends that it omits facts, evidence, documents, testimony or other evidence on which the Department relies to support a finding that this amendment will not have a significant adverse economic impact on business (GC 11346.2(b)(6)). He contends that reasonable alternatives and the Department’s reasons for rejecting such alternatives have been omitted. He contends that these omissions render the notice defective. He contends that these documents provide no substantial evidence that link sexually explicit images possessed by inmates with any threat to prison security, impediment to rehabilitation or increase in sexual harassment. Commenter contends that the rationale consists of speculative assertions and conjectures without any substance or evidentiary support. He contends that the *Mauro* decision is irrelevant to whether or not the regulation is reasonably necessary under the APA.

Accommodation: None.

Response L: Department contends that the Notice and the Informative Digest were approved by OAL pursuant to the requirements of the Government Code (GC). The ISOR also fulfills the requirement of the GC 11346.2. The GC has recently been amended to clarify requirements that an agency must describe reasonable alternatives to a proposed regulation and reasonable alternatives that would lessen any adverse impact on small business by stating that both requirements are subject to the existing rule that an agency need not “artificially construct alternatives or justify why it has not identified alternatives.”

Comment M: Commenter contends that the Department violated due process by improperly and inappropriately adopting the regulation as an emergency. He contends that pursuant to PC 5058 through 5058.3, the Director has a choice between certifying in a written statement that the operational needs of the Department require the amendment of this regulation on an emergency basis (PC 5058.3(a)(2)); and declaring in a written statement that the amendment is necessary for the immediate preservation of the public peace, health and safety, or general welfare (GC 11346.1). Commenter contends that the Notice of Adoption of Emergency Regulations contained neither type of statement. He contends that the Department’s failure to include any statement to support the emergency action prejudiced his right to submit written comments to OAL, he further contends that such prejudice constitutes a violation of his right to due process. Commenter requests the Department rescind Administrative Bulletin 02/04 and abandon any rulemaking effort to declare sexually explicit material to be contraband.

Accommodation: None.

Response M: See Commenter #15, Response K. Also, Department contends that a Certification of Operational Necessity was filed with OAL and was approved pursuant to GC Sections 11346.1 and 11349.6, and PC Section 5058.3.

COMMENTS #16:

Comment A: Commenter contends that after passage of SB 1260, prison officials had specific authority to exclude obscene material from entering California State prisons; modifying PC 2601(c)(1) to include obscenity as contraband. He contends that NCDR 95/1 made specific the provisions of PC 2601 excluding material deemed to be obscene under the legal standard of PC 311(a). He further contends that the reasons given for the proposed regulations were identical to the ones now given to justify the current proposed regulations. He contends that OAL rejected NCDR 95/1, as it merely incorporated by reference the obscenity definition of PC 311(a), diminishing the

significance of the legal standard for obscenity and the regulations were rewritten including CCR, Section 3006(c)(15)(A).

Accommodation: None.

Response A: See Commenter #2, Response B. Also, Department contends that these emergency regulations were filed in accordance with the Government Code and were approved by OAL.

Comment B: Commenter contends that the proposed regulations will adversely affect business in California and elsewhere. He contends that mainstream publications will lose subscribers and related revenue and that small publishers will also be deprived of revenue. He contends that business expansion will be curtailed or prevented, especially among those who derive significant revenue from prisoners.

Accommodation: None.

Response B: Department contends that this regulation will not adversely affect business in California or elsewhere. As documented on the Fiscal and Economic Impact Statement, there is no cost or savings to any business or state agency, nor does this regulation have any other non-discretionary cost or savings imposed on local business or agencies. Lastly, there is no cost or savings in federal funding to the state.

Comment C: Commenter contends that there are reasonable, effective alternatives to carry out the stated objectives. He proposes to (1) amend Section 3008 to prohibit the display of frontal nudity in living quarters would eliminate perceived hostility in the workplace; (2) provide mandatory sensitivity training; (3) adopt mail regulations with restrictions imposed for past or future inappropriate behavior of the type described should virtually eliminate hostility and would reward the majority for behaving responsibly. Commenter proposes the following language be added to 3136:

(a)... or may be prohibited due to inmate misconduct, specifically a previous or current guilty finding of lewd behavior or comments directed at staff, violation of Section 3008, or giving away, lending, or otherwise disposing of approved mail in violation of Section 3192.

And in

(b)...Facilities shall maintain a list of inmate applicants authorized to receive the mail. Upon transfer, approved inmates' status shall be transmitted to the mailroom of the receiving facility for inclusion on their list. The last name and prison number of the approved inmate recipient shall be written in black marker on the inside cover of magazines and books and on the backs of photographs before delivery. The Commenter contends that this small addition to existing regulations preserves the rights of the vast majority of inmates who do not engage in inappropriate sexual behavior and provides incentive to refrain from it. It would be a minimal cost to staff, as he contends that the disapproval procedure is already in place. He contends that the disapproval process requires paperwork, the approval process merely involves looking up a name and writing that name and prison number on the mail.

Accommodation: None.

Response C: See Commenter #1, Response A. Also, Department contends that these regulations allow inmates to retain alternative means of exercising their constitutional First Amendment rights to receive sexually explicit material.

Comment D: Commenter contends that prior to SB 1260 prison officials were authorized under PC 2600 to restrict general civil rights that could adversely affect prison safety and security, and that using this standard, no restrictions on adult material were introduced, as no security connection could be established. He contends that after the "legitimate penological interest" standard was implemented, prison officials and the Legislature determined the prohibition of obscene material met this standard, codifying PC 2601(c)(1). Commenter contends that it is inconceivable that the Legislature would establish a new standard, and then craft a statute guaranteeing specific civil rights contrary to that standard. He contends that security-related provisions are attached to the guarantees, such as the right to open and inspect mail and to limit the number of publications an inmate may possess. He contends that the guarantees cannot be further modified other than to establish procedures for their implementation.

Accommodation: None.

Response D: Department contends that these regulations allow inmates to retain alternative means of exercising their constitutional First Amendment rights to receive sexually explicit material. **Also, see Commenter #5, Response E.**

Comment E: Commenter contends that under Section 3270, the Department's policy is to provide inmates with "every reasonable opportunity and encouragement to participate in rehabilitative activities." He contends that participation in rehabilitative activities is voluntary and that banning non-obscene speech is not a rehabilitative activity and inmates have no choice whether or not to participate. He contends that the Department has not stated how reading Playboy Magazine hinders rehabilitation or how its prohibition helps rehabilitation.

Accommodation: None.

Response E: Department contends that viewing Playboy Magazine is not a rehabilitative activity. Section 3270 also states that the Department will make a consistent effort to insure the security of the institution and the effectiveness of the treatment programs within the framework of security and safety. The Department contends that unrestricted access to sexually explicit material could create a security issue, thereby jeopardizing the safety of prison staff and other inmates. **Also, see Commenter #3, Response A.**

Comment F: Commenter contends that it is impossible for an inmate to sexually harass any departmental employee. He contends that CCR, Section 3401.5 forbids employee/employee and employee/inmate sexual harassment. He contends that inmate/employee sexual harassment is absent, for good reason, inmates are not in positions of authority over employees, nor are they clients with equal legal standing. He contends that they are wards under the protection of government employees with absolute authority and can be ordered to do virtually anything. He contends that employees are required to report rule violations and take appropriate action when they occur. When an inmate behaves inappropriately toward female employees, the Commenter contends that the following disciplinary actions can be taken: CCR, Sections 3004, 3005, 3007, 3314(a)(3)(1), 3315(a)(3)(H) and (O), 3316, 3330 and 3335(a). He contends that these have much more of a deterrent effect than further restricting mail. He asks a question of why are male employee who work at female facilities not subjected to the so-called "daily barrage" of sexual advance, and why aren't female police officers claiming sexual harassment when routinely exposed to verbal abuse, lewd behavior, and material? He contends that the answer is that both have powerful law enforcement tools at their command and are required to use them when necessary.

Accommodation: None.

Response F: See Commenter #3, Response A and B and Commenter #5, Response E and F.

Comment G: Commenter contends that prisons are unpleasant places to live and work and that misbehavior is inevitable. He contends that respect for women cannot be imposed by restricting mail, he contends that a "pin-up" on a cell wall may offend some female or male employees, the same "pin-up" tucked away should not. He contends that by modifying Section 3008 and prohibit the display of frontal nudity, the Department's goal would be accomplished. He contends that employees are normally prohibited from reading legal material and private papers while performing cell searches and that female employees need not peruse the adult magazines or photo albums for something to offend, they need only check them for contraband as they would any legal material or personal letters.

Accommodation: None.

Response G: Department contends that departmental employees, as part of their job, must perform cell searches, which includes examining books or magazine for contraband, looking at each page and the spine of the books and magazines. Staff also search for notes or gang material, and have to flip through every page, even in performing a cursory search, staff are subjected to all photos, drawings, etc. that are being searched. Staff must search material that is "tucked away" due to the fact that even items such as Polaroid photos could have contraband stuck in the back and even though they are not a "pin-up" would be considered illegal contraband.

Comment H: Commenter contends that in prisons as well as in the public, adult material is primarily used as a masturbation aid. He contends that masturbation is healthy and normal, nor is it prohibited by regulations, and it is the only licit sexual activity available to inmates. He contends that prostate health is a legitimate concern. He states that the herb Saw Palmetto and regular sexual activity can slow or prevent prostate enlargement according to a Dr. Andrew Guay. He further contends that

the prostate and seminal vesicles produce fluid, and when unused the fluid backs up and the glands swell, the congestion occurs and the prostate gland squeezes the urinary tract, leading to complications, such as prostate cancer, a known killer. He contends that this regulation is actively discouraging masturbation in private by banning material used solely for that purpose, he contends that the Department threatens the health and well-being of an aging prison population and places an avoidable financial burden on taxpayers by increasing medical cost.

Accommodation: None.

Response H: Department contends that if the Commenter has a documented medical condition, he may contact the medical staff at the institution. In Section 3350, it states that the Department shall only provide medical services for inmates, which are based on medical necessity and supported by outcome data as effective medical care. In the absence of available outcome data for a specific case, treatment will be based on the judgment of the physician that the treatment is considered effective for the purpose intended and is supported by diagnostic information and consultations with appropriate specialists. If the medical condition is having an adverse effect upon their welfare, a CDC 602, inmate appeal, may be filed. The Department further contends that current regulations ensure that the aging inmate population will receive adequate medical attention during incarceration.

Comment I: Commenter contends that the Department must consider the issue of prison rape. He contends that the incidence of prison rape has declined with the availability of adult material and the right to receive all non-obscene mail. He contends that without adult material, the most violent inmates will turn to the weakest among their own sex, and he contends that they, along with female employees will be in a dangerous situation. Female employees will be susceptible to violence and disrespect and inmates will be exposed to increased aggression, rape, venereal disease, and AIDS.

Accommodation: None.

Response I: Department contends that there is no documented proof that the availability of sexually explicit material has reduced the incidence of rape within the institutions. The Department contends that sexually explicit materials, within the institutions, have contributed to an increase of verbal assaults and have lead to intimidation of female correctional staff when attempting to perform cell searches. Inmates subject female correctional staff to a daily barrage of unwarranted sexual advances, thus causing an uncomfortable working environment and continued confrontation with inmates. Additionally, unrestricted access to sexually explicit material could lead to bartering between inmates and anatomical comparisons could lead to fights between inmates thereby jeopardizing the safety of prison staff and other inmates.

Comment J: Commenter contends that the language is inconsistent. He contends that inmate exposure to actual frontal nudity outside an educational or artistic context is no more harmful than inside an educational setting. He contends communal showers, group strip searches and living spaces exposes inmates to more frontal nudity than any pictorial context and should be prohibited since the Department is prohibiting pictures, magazines and drawings. He further contends that this regulation is discriminatory against heterosexuals because it treats them differently from inmates who prefer their own sex.

Accommodation: None.

Response J: Department contends that inmates who are in an educational setting and studying authorized and approved educational, medical/scientific, or artistic material are less likely to view the educational material as sexually explicit than unauthorized material that has been prohibited that depicts frontal nudity of either gender, in an adult magazine, a nude photograph or drawing, etc.

See Commenter #9, Response D. The Department also contends that in Section 3007, there are existing regulations, which prohibit the participation of inmates in illegal sexual acts. Inmates are specifically excluded in laws, which remove legal restraints from acts between consenting adults. Inmates must avoid deliberately placing themselves in situations and behaving in a manner which is designed to encourage illegal sexual acts.

Comment K: Commenter contends that the regulation is contradicting existing law. He contends that existing language acknowledges the right of inmates to receive non-obscene mail in accordance with State statute. He contends that this regulation treats that right as if it never existed. He contends that if passed, the regulations will follow regulations implemented to guarantee receipt of

non-obscene mail; stating the receipt of non-obscene mail is not guaranteed. He asks which provision can be relied upon -- one regulation gives and the other takes away.

Accommodation: None.

Response K: See Commenter #2, Response B, Commenter #5, Response E and F.

Comment L: Commenter contends that there is no credible evidence suggesting a link between frontal nudity and violence. He contends that based on this reasoning, the Department could ban “VIBE” magazine because it features art and events that could promote gang activity; “Field and Stream” magazine because it could promote illegal use of guns; the “Holy Koran” or pictures of Osama bin Laden because they could promote terrorist attacks on staff; “true crime” books and magazines because they could provide instruction in the commission of crimes, etc. He further contends the behavior used to justify a ban is more prevalent in the California Youth Authority (CYA) where pictorial frontal nudity is not allowed due to the inmates’ minor status. He contends that if frontal nudity were the cause of the behavior, the CYA would be incident free. He contends that disciplinary statistics can readily disprove the current justifications.

Accommodation: None.

Response L: See Commenter #3, Response A, Commenter #5, Response E. Department further contends that the comments regarding CYA’s disciplinary statistics, does regard an aspect or aspects of the subject proposed regulatory action or actions and must be summarized pursuant to the Government Code, the above comment is either insufficiently related to the specific action, or generalized or personalized to the extent that no meaningful response can be formulated by the Department in refutation of or accommodation to the comment.

Comment M: Commenter contends that inmates do have the right to produce manuscripts. He contends that to prohibit drawings and paintings, which do not violate the law and do not incite to violence is a violation of his constitutional rights. He contends prison officials do not have the legal authority to prohibit the creative product of incarcerated artists because they disagree with the messages or medium of expression.

Accommodation: None.

Response M: Department contends that inmates do have the right produce manuscripts as described in Section 3000; however, Section 3152 states that an inmate will not be permitted to retain in his or her personal possession manuscripts which violate the provisions of Section 3006. **Also, see Commenter #5, Response G.**

Comment N: Commenter contends that the regulations provide no alternatives since explicit books, articles, and letters are already routinely disallowed. He contends that sexually explicit articles are rarely written without illustration. He contends that clothed persons are by definition not sexually explicit. He also contends that the standards for denying art will be measured differently at each facility.

Accommodation: None.

Response N: Department contends that inmates retain alternative means of exercising their constitutional right to receive sexually explicit communications, since these regulations do not prohibit sexually explicit letters nor does it prohibit sexually explicit articles or photographs of clothed persons. The Department also contends that these regulations were filed to standardize on a statewide basis the description of sexually explicit materials. **Also, see Commenter #5, Response E.**

Comment O: Commenter contends that the *Mauro* case concerns jail conditions. He also contends that the Sheriff in Maricopa County, Arizona, seeks publicity and his main intent is to punish, humiliate, and demean county jail inmates. Commenter contends that after inmates are sentenced to prisons in Arizona they are no long subject to the restrictions. He contends that inmates, on an average, spend 4-5 years in prison making the deprivation of any civil rights much more onerous than a two-week stay in a Maricopa County jail. He contends two years after the *Mauro* case was decided, an Arizona state prisoner sued in federal court, compelling prison officials to return non-obscene publications (*Broulette v. Starns*, 161 F. Supp. 2d 1021, USDC Ariz. 2002). He contends that Arizona prisoners are protected by a consent decree.

Accommodation: None.

Response O: Department contends that this comment is aggregated and summarily dismissed because it is made in the form of a general statement, is unsubstantiated, and no reasonable accommodation on the part of the Department is possible.

Comment P: Commenter contends that California inmates, pursuant to PC 2601(c) are not subject to the restrictions of the Arizona case. He contends that since congressional passage of the Prison Litigation Reform Act, federal judges are forbidden to issue orders to decrees that are not in the legitimate penological interest to exceed the protections of the US Constitution. He contends that whether by consent decree or state statute, the guarantees are identical. He contends that California inmates are protected by state statute; Arizona jail detainees are not.

Accommodation: None.

Response P: See Commenter #5, Response E. Also, Department contends that PC 2601(c)(2)(A) and (B) provide for this regulation.

Comment Q: Commenter contends that he has been a California state inmate since May 1982, residing at several medium and maximum-security facility. He contends that 21 years qualifies him as an expert on prison living conditions. He also states that he has a BSBA from Chapman University, trained in fine arts, and has moderate acclaim in that area. He contends that he has never behaved inappropriately with female employee. He contends that adult publications were sold in prison canteens until September 1994. He contends that receipt of adult material was virtually unrestricted with the exception of unlawful material, until January 1995 and the implementation of SB 1260 and the introduction of 15 CCR, Section 3306(c)(15)(A) and (C)(1-6) which excludes obscene publications. He contends that in the 1980's he had direct knowledge of a handful of instances of inappropriate sexual behavior or statements directed by inmates toward female housing unit staff. He contends that adult material was not put forward as a causative factor. He contends that the offender was immediately subdued and placed in handcuffs, admitted into Administrative Segregation and written up on serious disciplinary charges. He contends that there is far more verbal disrespect directed at male staff than female. He contends that female staff have become more common in prison and the general population has grown accustomed to them and that most female staff interact with inmates in the same fashion as male staff. He also contends that he has witnessed hundreds of cell searches, and when conducted professionally by either male or female staff, inmates do not complain. He contends that searches are done in pairs and that staff is not intimidated and that if an inmate interferes, the inmate is written up, but he states that this rarely happens and the majority of searches occur without incident.

Accommodation: None.

Response Q: Department contends that portions of this comment are summarily dismissed because they are made in the form of a general statement and are unsubstantiated. Also, see Commenter #1, Response A and Commenter #3, Response C.

Comment R: Commenter contends that the regulations claim that female staff is subjected to "a daily barrage of sexual advances" by inmates, which he contends is a gross exaggeration. He contends that regulations require inmates and staff to treat one another with respect. He contends that there is little evidence establishing a connection between non-obscene speech and the allegations used to justify a ban.

Accommodation: None.

Response R: See Commenter #3, Responses A and C.

Comment S: Commenter contends that barter is prohibited by regulations, yet it occurs openly. He contends that coffee, tobacco, food, cosmetics and postage stamps are the major barter items. He contends that a ban on adult material would likely create a black market. He contends that to eliminate barter, it would be necessary to prohibit all items of value, including soap and toothpaste.

Accommodation: None.

Response S: See Commenter #3, Response D.

Comment T: Commenter contends that current regulations do not allow "unrestricted access" to sexually explicit material, most is turned away under Section 3006(c)(15)(C)(1-6) whether it is obscene or not. He contends that frontal nudity is the only adult material allowed. He also contends that "anatomical comparisons" can lead to fights is not true and that the same comparisons could be made with bathing suit/underwear ads.

Accommodation: None.

Response T: See Commenter #2, Response B.

COMMENTER #17:

Comment A: Commenter contends that there is nothing in the regulations that precludes pictures, photos, drawings, etc., of naked buttocks so long as male or female genitalia is not visible. Commenter contends that this makes sense in that it is a ban on “frontal nudity;” however, if the whole concept in support of the ban is to rid the workplace of items that can be construed as obscene or offensive, then it only makes sense that any part of the anatomy that has a sexual association or perhaps excitatory value, should not be allowed in the prison environment. She contends that to do so leaves the Department open to claims of sexual harassment and a hostile work environment.

Accommodation: None.

Response A: Department contends that this regulation states that sexually explicit images that depict frontal nudity whether in the form of personal photographs, drawings, magazines, and/or pictorials shall be considered as contraband and that inmates shall not be allowed to possess such materials. Also, see Commenter #5, Responses D and E.

COMMENTER #18:

Comment A: Commenter contends that he is an inmate at Pelican Bay State Prison and has been insulted by the Frontal Nudity regulations. He contends that being denied seven adult periodicals by the institution has violated his First Amendment rights. He contends that he has been in the Department for eight years and he contends that the Department has constructed a policy that infringes on his constitutional rights. He contends that the Department is notorious for trying to deceive the public as well as the judicial system into believing that their sole interest in implementing policies such as the one being address “pornography” or an inmate’s right to possess such materials is to promote rehabilitation and maintain the security of institutions. He contends that this insults inmates who are aware of no programs being implemented that target rehabilitation. He contends that if the Department alleges that there have been 1,000 reports of inmates using adult material inappropriately (that are disciplined for abusing their right to possess adult material), then there is 90,000 inmates who use the material for self indulgence exclusively.

Accommodation: None.

Response A: See Commenter #3, Response D. Also, the Department contends that pursuant to CCR, Article 3, Work and Education, inmates are obligated to work or participate in vocational, therapeutic, educational, or other institution program assignment, while committed to the custody of the Director of Corrections.

Comment B: Commenter contends that the Department may get away with fooling the public, but a trial setting such as the Arizona case will eventually expose the regulations true nature.

Accommodation: None.

Response B: Department contends that this comment is aggregated and summarily dismissed because it is made in the form of a general statement and is unsubstantiated.

COMMENTER #19:

Comment A: Commenter contends that he objects to the regulations on the basis that there is not an emergency and that the Department did not comply with the APA by illegally issuing Administrative Bulletin 02/04. He contends that only after the Department received notice from the Prison Law Office that the new policy could not be enforced unless the Department complied with the APA did the Department do so.

Accommodation: None.

Response A: See Commenter #5, Response B.

Comment B: Commenter contends that the Department’s motivation is to punish prisoners for engaging in conduct protected by the Constitution of the US or by statute. He contends that inmates have been engaging in their right to associate with their wives and/or girlfriends by receiving personal photographs showing frontal nudity. He also contends that inmates have been engaging in their right to express themselves freely in drawing frontal nudity for artistic value.

Accommodation: None.

Response B: Department contends that a recent 9th Circuit Court decision (*Mauro v. Arpaio*, 188 F.3d 1054, 9th Cir. 1999) upheld the constitutionality of a correctional policy prohibiting prisoners from possessing sexually explicit materials that showed frontal nudity of either gender, including the exposed female breast(s) and/or the genitalia of either gender, because the policy was reasonably related to a legitimate penological interest. The Department contends that inmates retain alternative means of exercising their constitutional right to receive sexually explicit communications, since these regulations do not prohibit sexually explicit letters nor does it prohibit sexually explicit articles or photographs of clothed persons.

Comment C: Commenter contends that there has been no study conducted by the Department to show the connection between Frontal Nudity materials and prison security, rehabilitation, sexual harassment of female guards (or male) or a hostile work environment. He contends that the Department has no evidence showing that the elimination of frontal nudity materials would serve legitimate penological interests or that the materials are without redeeming social value. He contends that the materials do not produce a shameful or morbid interest in nudity, sex or excretion by inmates, for the Department to ban frontal nudity materials under the catchall of legitimate penological interests. He further contends that this regulation is nothing more than harassment of inmates engaging in constitutionally protected conduct.

Accommodation: None.

Response C: See Commenter #3, Response A.

Comment D: Commenter contends that the Department lacks the authority to amend PC 2600 and 2601 to redefine “Obscene Matter” within the meaning of PC 311 under the catchall of legitimate penological interest. He contends that if the Department has legitimate penological interests, they would have changed the laws years ago.

Accommodation: None.

Response D: See Commenter #2, Response B and Commenter #3, Response A.

Comment E: Commenter contends that the Department is prohibited by the “Bill of Attainder” clause of the US Constitution, because the Frontal Nudity policy attains an inmate guilty of misconduct and inflicts punishment without ever determining if the inmate is guilty of misconduct.

Accommodation: None.

Response E: See Commenter #19, Response B. Also, Department contends that the “Bill of Attainder” does not apply in this case as it is not singling out a specific group of inmates, the regulations applies to all inmates equally.

Comment F: Commenter contends that applying Contemporary Statewide Standards to Frontal Nudity materials possessed by inmates fails to satisfy the “Turner Test” as determined by the U.S. Supreme Court in *Turner v. Safley*, 482 U.S. 78 (1987).

Accommodation: None.

Response F: See Commenter #19, Response B.

Comment G: Commenter contends that the new policy would infringe on Congressional Commerce Powers under Article I, Section 8, cl.3, of the U.S. Constitution, by not allowing prisoners to purchase, receive, and read any and all newspapers, periodicals, and books accepted for distribution by the US Post Office, that contain Frontal Nudity materials.

Accommodation: None.

Response G: See Commenter #5, Responses E, F, and G.

Comment H: Commenter contends that the Departments reliance on the *Mauro* decision is misplaced, because under PC 2660 and 2601, there is a policy restricting possession of sexually explicit materials as defined in Title 15, Sections 3006(c)(15)(A) and (C), and 3007 and 3008.

Accommodation: None.

Response H: See Commenter #2, Response B, and Commenter #5, Responses E and G.

COMMENTER #20: (FORM LETTER #20, 28)

Comment A: Commenter contends that removing frontal nudity will not help maintain the safety and security of prisons. Commenter contends that it will take away another privilege that the inmates have had for an extremely long time. Commenter contends that this regulation could make inmates more agitated and uneasy, thus increasing hostility and hindering rehabilitation. Commenter

contends that punitive reasons are negative and that rewards such as the freedom to receive materials with frontal nudity has a much more positive effect than negative.

Accommodation: None.

Response A: See Commenter #1, Response A.

Comment B: Commenter contends that removing frontal nudity will not have an impact on sexual harassment toward female guards. Commenter contends that one study shows that gender equality was high in states characterized by higher circulation rates of pornography. Commenter contends that any time there are a large number of males and a fewer number of females together sexual harassment is likely to increase.

Accommodation: None.

Response B: See Commenter #3, Responses A and B.

Comment C: Commenter contends that there is harassment in the female facilities where female inmates are impregnated by male guards.

Accommodation: None.

Response C: See Commenter #3, Response D.

Comment D: Commenter contends that if family visits were increased and more inmates were permitted to participate that harassment would decrease.

Accommodation: None.

Response D: See Commenter #3, Response D.

Comment E: Commenter contends that bartering between inmates has been around since the beginning of incarceration and is a way to survive. Commenter contends that removing literature will not contribute to reducing or stopping this bartering, but will, instead, increase bartering because it is considered contraband and more valuable.

Accommodation: None.

Response E: See Commenter #3, Response A.

Comment F: Commenter contends that anatomical comparisons most likely happen in the open showers, and contends that it starts in middle school, if not sooner.

Accommodation: None.

Response F: See Commenter #3, Response D.

Comment G: Commenter contends that as an employer in the private sector, if a harassment situation arises, the employees are assigned to a less hostile area. Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations.

Accommodation: None.

Response G: See Commenter #3, Response C.

COMMENTER #21:

Comment A: Commenter contends that a recent study shows that gender equality was higher in states characterized by higher circulation rates of pornography, suggesting that pornography and gender equality both flourish in politically tolerant societies. She also contends that another study shows that the use of nonviolent pornography was not uniquely associated with potential or actual sexual aggression.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that removing frontal nudity will not help maintain the safety and security of prisons. Commenter contends that it will take away another privilege that the inmates have had for an extremely long time. Commenter contends that this regulation could make inmates more agitated and uneasy, thus increasing hostility and hindering rehabilitation. Commenter contends that punitive reasons are negative and that rewards such as the freedom to receive materials with frontal nudity has a much more positive effect than negative.

Accommodation: None.

Response B: See Commenter #1, Response A.

Comment C: Commenter contends that bartering between inmates has been around since the beginning of incarceration and is a way to survive. Commenter contends that removing literature will not contribute to reducing or stopping this bartering, but will, instead, increase bartering because it is considered contraband and more valuable.

Accommodation: None.

Response C: See Commenter #3, Response A.

Comment D: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations.

Accommodation: None.

Response D: See Commenter #3, Response C.

COMMENTER #22: (FORM LETTER #22, 26, 27, 32, 33, 34, 35)

Comment A: Commenter contends that she objects to the regulation and that the Department has not considered other alternatives. She contends that the Department should place female officers who have problems with seeing nude photos at the women's prisons. She contends that would take care of two problems, one being taking men out of the sensitive areas of the women's prison would cut down on rapes and sexual harassment of women prisoners and it would put female officers there and remove them from men's prisons.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations. She contends that this regulation is as foolish as the lawsuit recently filed against the fast food companies blaming the fast food companies for making the customers obese. She contends that it is the female guard's personal choice to work in the men's prison. She further contends that female guards wear tighter uniforms than any visitor would ever be allowed to wear into a visiting room and that if a male inmate complains he is laughed at or ignored. She contends that CCPOA okay's this type of behavior as a "perk of the job." She contends that guards are rarely disciplined for any infractions of this kind. She questions departmental training of guards about openly watching the opposite sex prisoners shower.

Accommodation: None.

Response B: See Commenter #3, Responses C and D.

Comment C: Commenter contends that the Department offers the inmates "alternate means of exercising their constitutional right to receivesexually explicit letters...." She contends that an inmate could sexually harass a female guard after reading a letter too, so why are photos singled out? She contends that this is inconsistent with the reasons given for changing the rules.

Accommodation: None.

Response C: Department contends that Article 5 of the Title 15 defines the disciplinary methods in which inmate misconduct shall be handled. Also, the Department contends that the regulations were duly adopted on September 30, 2002, and were in compliance with all APA standards.

Comment D: Commenter contends that the Department creates violence among inmates by taking away every avenue of venting anger and frustration. She contends that if the Department keeps taking away some of the positive ways of venting (family visits and weights), then there could be another Attica and there could be more riots, fights, and escapes.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #23:

Comment A: Commenter contends that the proposed regulations prohibits magazines such as "Playboy" which contain literary, artistic, political, and scientific value and that by community decency standards is not obscene.

Accommodation: None.

Response A: See Commenter #5, Response G.

Comment B: Commenter contends that in *Broulette v. Starns* (161 F. Supp. 1021, D. Ariz. 2001) on remand from the Ninth Circuit (188 F. 3d 512) held that *Hustler Magazine* did not meet the obscenity standard, as a whole, unless there was depictions of homosexual acts, sexual penetration or oral sex. He contends that “legitimate penological interests of maintaining the safety and security of the institution” is a catchall phrase used by the Department. Commenter contends that the Department has presented no factual material of its claim of female staff harassment or bartering between inmates and anatomical comparisons leading to fights. He contends that he is that there have been very few write-ups for indecent exposure. He contends that comparisons could be made while inmates watch TV.

Accommodation: None.

Response B: See Commenter #2, Response B and Commenter #3, Response A.

Comment C: Commenter contends that the Penal Code does not state that inmates are to be rehabilitated and that California gave up on rehabilitation and that it is only used for a “buzz” word now.

Accommodation: None.

Response C: See Commenter #10, D.

Comment D: Commenter contends that the artfully done frontal nudity in *Playboy Magazine* is not nearly as erotic and sexually arousing as photos of women showing only butt cheeks, etc. He contends that viewing sexually explicit photos is sexually arousing but also reading sexually explicit material puts an image into the mind and could lead to sexual harassment. He contends that *Playboy* is composed of mostly literary, political, and scientific articles. He contends that *Playboy* exposes abuses and corruption in the prison system. He contends that *Playboy* is invaluable information for men in prison who want to stay informed of social and political issues and audio and audio technology.

Accommodation: None.

Response D: See Commenter #2, Response A.

Comment E: Commenter contends that the State cannot legislate or regulate morality. He contends that there is not a community in California that bans “*Playboy*” for violating community decency standards. However, he does state that magazines such as *Hustler*, *Club*, *High Society*, etc. have no place in society and are banned for violating decency standards.

Accommodation: None.

Response E: See Commenter #5, Response G.

Comment F: Commenter contends that the best enforcement of the current policy would be to not allow any nude pictures to be displayed in living quarters. He contends that many female staff are not offended by the display of nude photos, but many are.

Accommodation: None.

Response F: See Commenter #3, Response C.

Comment G: Commenter contends that this regulation is similar to that of the “no smoking policy” in living quarters, in that it is not consistently enforced, so it is abused. He contends that second hand tobacco smoke kills thousands and costs taxpayers millions, however, there is not discussion to ban smoking in the prisons.

Accommodation: None.

Response G: See Commenter #3, Response D.

COMMENTER #24:

Comment A: Commenter contends that they were in receipt of a letter from the Men’s Advisory Council (MAC) at RJ Donovan Correctional Facility in San Diego, California regarding a policy amendment banning all materials displaying frontal nudity within facilities under the control of the Department. Commenter contends that the MAC requested the Far East Publications, Inc. to write a letter to the Department stating that they would be adversely impacted by this regulation. Commenter contends that this regulation would not impact subscription or advertising revenue contrary to the MAC’s claim. They contend that they stopped servicing subscription to inmates over seven years ago, due to the fact that inmates were selling the magazines or claiming they had

never received them or that prison staff was stealing the magazines from the mail and because of the constantly changing prison censorship laws in various states.

Accommodation: None.

Response A: Department agrees with commenter in that this regulation will not have a fiscal impact.

COMMENTER #25:

Comment A: Commenter contends that the regulation was based on an Arizona ruling and is intended to reduce tension and prevent sexual harassment. He contends that this out-of-state ruling has no basis in California. He contends that there is a big difference in obscene pictures and nudity and that this regulation is really a Christian moral issue.

Accommodation: None.

Response A: See Commenter #6, Response D.

Comment B: Commenter contends that that this regulation will increase tension and that the guards are dishonest and abusing their positions and are mishandling property pertaining to this regulation. He contends that there needs to be stricter guidelines for staff regarding what is allowed and what is not. He contends that that all of the inmate appeals should be reversed in favor of the applicant.

Accommodation: None.

Response B: See Commenter #3, Response D.

Comment C: Commenter contends that there is no rehabilitation in the prison environment.

Accommodation: None.

Response C: See Commenter #10, Response D.

COMMENTER #26: (FORM LETTER #22, 26, 27, 32, 33, 34, 35)

Comment A: Commenter contends that she objects to the regulation and that the Department has not considered other alternatives. Commenter contends that the Department should place female officers who have problems with seeing nude photos at the women's prisons. He contends that would take care of two problems, one being taking men out of the sensitive areas of the women's prison would cut down on rapes and sexual harassment of women prisoners, and it would put female officers there and remove them from men's prisons.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations. He contends that this regulation is as foolish as the lawsuit recently filed against the fast food companies blaming the fast food companies for making the customers obese. He contends that it is the female guard's personal choice to work in the men's prison. He further contends that female guards wear tighter uniforms than any visitor would ever be allowed to wear into a visiting room and that if a male inmate complains he is laughed at or ignored. He contends that CCPOA okays this type of behavior as a "perk of the job." He contends that guards are rarely disciplined for any infractions of this kind. He questions departmental training of guards about openly watching the opposite sex prisoners shower.

Accommodation: None.

Response B: See Commenter #3, Responses C and D.

Comment C: Commenter contends that the Department offers the inmates "alternate means of exercising their constitutional right to receivesexually explicit letters...." He contends that an inmate could sexually harass a female guard after reading a letter too, so why are photos singled out? He contends that this is inconsistent with the reasons given for changing the rules.

Accommodation: None.

Response C: See Commenter #22, Response C.

Comment D: Commenter contends that the Department creates violence among inmates by taking away every avenue of venting anger and frustration. He contends that if the Department keeps taking away some of the positive ways of venting (family visits and weights), then there could be another Attica and there could be more riots, fights and escapes.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #27: (FORM LETTER #22, 26, 27, 32, 33, 34, 35)

Comment A: Commenter contends that she objects to the regulation and that the Department has not considered other alternatives. Commenter contends that the Department should place female officers who have problems with seeing nude photos at the women's prisons. He contends that would take care of two problems, one being taking men out of the sensitive areas of the women's prison would cut down on rapes and sexual harassment of women prisoners and it would put female officers there and remove them from men's prisons.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations. He contends that this regulation is as foolish as the lawsuit recently filed against the fast food companies blaming the fast food companies for making the customers obese. He contends that it is the female guard's personal choice to work in the men's prison. He further contends that female guards wear tighter uniforms than any visitor would ever be allowed to wear into a visiting room and that if a male inmate complains he is laughed at or ignored. He contends that CCPOA okays this type of behavior as a "perk of the job." He contends that guards are rarely disciplined for any infractions of this kind. He questions departmental training of guards about openly watching the opposite sex prisoners shower.

Accommodation: None.

Response B: See Commenter #3, Responses C and D.

Comment C: Commenter contends that the Department offers the inmates "alternate means of exercising their constitutional right to receivesexually explicit letters...." He contends that an inmate could sexually harass a female guard after reading a letter too, so why are photos singled out? He contends that this is inconsistent with the reasons given for changing the rules.

Accommodation: None.

Response C: See Commenter #22, Response C.

Comment D: Commenter contends that the Department creates violence among inmates by taking away every avenue of venting anger and frustration. He contends that if the Department keeps taking away some of the positive ways of venting (family visits and weights), then there could be another Attica and there could be more riots, fights and escapes.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #28: (FORM LETTER #20, 28)

Comment A: Commenter contends that removing frontal nudity will not help maintain the safety and security of prisons. Commenter contends that it will take away another privilege that the inmates have had for an extremely long time. Commenter contends that this regulation could make inmates more agitated and uneasy, thus increasing hostility and hindering rehabilitation. Commenter contends that freedom to receive materials with frontal nudity has a much more positive effect than negative.

Accommodation: None.

Response A: See Commenter #1, Response A.

Comment B: Commenter contends that removing frontal nudity will not have an impact on sexual harassment toward female guards. Commenter contends that there is no proof that removing frontal nudity will have an impact on sexual harassment. Commenter contends that any time there are a large number of males and a fewer number of females together sexual harassment is likely to increase. Commenter contends that female guards should be assigned to positions where they are not exposed to hostile environments, then they would have no complaints.

Accommodation: None.

Response B: See Commenter #3, Responses A, B, and C.

Comment C: Commenter contends that bartering between inmates has been around since the beginning of incarceration and is a way to survive. Commenter contends that removing literature will not contribute to reducing or stopping this bartering, but will, instead, increase bartering because it is considered contraband and more valuable.

Accommodation: None.

Response C: See Commenter #3, Response A.

Comment D: Commenter contends that anatomical comparisons most likely happen in the open showers.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #29:

Comment A: Commenter contends that Playboy, published since 1953, has never been adjudicated in any Federal, State, or local jurisdiction to be obscene, pornographic, harmful to minors, or in violation of any law or regulation. Commenter contends that it is accepted throughout the country.

Accommodation: None.

Response A: See Commenter #5, Response G.

Comment B: Commenter contends that Playboy depicts frontal nudity and although people have had elitist objections to its content, the success of the magazine is testimony to its general acceptance. He contends that nudity is a part of life and is not obscene in and of its self, even to children. He contends that the ban on publications displaying frontal nudity is punitive and bears no relationship to legitimate prison interests, such as a prevention of violence or sexual harassment.

Accommodation: None.

Response B: See Commenter #3, Response D.

Comment C: Commenter contends that in a declaration from an expert for the plaintiffs in a case filed in Wisconsin the expert contends that prohibiting sexually explicit material is not necessary to maintain the security of an institution and may, in fact, have an opposite effect. The expert further contends that letters and publications that contain written descriptions of non-violent and lawful sexual activity do not generally have a negative effect on security or inmate rehabilitation, nor do they lead to an increase in harassment of female employees. In this case the plaintiffs did not prevail.

Accommodation: None.

Response C: See Commenter #1, Response A and Commenter #3, Response A.

Comment D: Commenter contends that the proposed regulation, unless justified by legitimate penological reasons, is inconsistent with the Penal Code.

Accommodation: None.

Response D: See Commenter #3, Response A and Commenter #5, Response G.

Comment E: Commenter contends that he enclosed materials regarding the contents of Playboy. (The enclosed material is a list of only names of over 1,000 individuals who were interviewed by Playboy.) Commenter contends that focusing upon occasional nude pictures to the exclusion of the general content of the magazine is more revealing about the motivation of the authorities promulgating the proposed rule than is informative of the asserted justification.

Accommodation: None.

Response E: Department contends that the regulations do not restrict the rights of inmates to possess sexually explicit letters or articles such as those in Playboy, the regulations do, however, prohibit personal photos, magazines, drawings, or other pictorial format, which contains materials of a sexually explicit nature. **Also, see Commenter #3, Response B.**

Comment F: Commenter contends that studies in the Presidential Commission on Obscenity and Pornography confirm the hypocrisy in the proposed regulation. He contends that a study, at Atascadero State Hospital, confirmed that sexual offenders have had less exposure to explicit sexual material than the population as a whole or the general prison population. He further contends that despite theoretical causal links, demonstrated empirical links between pornography and sex crimes in general are weak or absent. He contends that individual violent sex offenders have no link between their offenses and their use of pornography, if anything, they do not appear to use pornography as much as the average male.

Accommodation: None.

Response F: See Commenter #3, Response A. Also, Department contends that this comment is made in the form of a general statement, and is an unsubstantiated opinion and therefore no reasonable response can be made.

Comment G: Commenter contends that adding punitive measures of incarceration may be constitutional under the wide latitude afforded to prison authorities that is, not to say, it is good penal policy or is wise or accomplishes its intended purpose.

Accommodation: None.

Response G: See Commenter #3, Response D.

Comment H: Commenter contends that prison experience should prepare inmates to return to the real world and not to isolate them from it. He contends that censorship frequently appears to be justified, but has been shown to be counter-productive. He contends that he has received letters from inmates who have never violated prison regulations or been disciplined for possession or reading Playboy and they believe these regulations are for the purpose of inflicting additional retribution for the crimes for which they were sentenced.

Accommodation: None.

Response H: See Commenter #3, Response D and Commenter #10, Response D.

COMMENTER #30:

Comment A: Commenter states that they would urge the Department to continue the ban on all forms of pornography in prisons. Commenter contends that in a court case the court rightly noted that the military honor, professionalism, and decorum will be adversely affected or tainted by the official, military-sponsored sale of such materials and that the military should not be in the business of selling or providing sexually explicit materials.

Accommodation: None.

Response A: Department contends that this is a general statement and opinion, and no reasonable response is necessary.

Comment B: Commenter contends that the US Ninth Circuit Court of Appeals, in a September 13, 2002 decision, upheld the ban on the sale and rental of pornography on American military bases.

Accommodation: None.

Response B: Department contends that this is a general statement and opinion, and no reasonable response is necessary.

Comment C: Commenter contends that if the Department allows inmates to read the material in front of female officers, then the Department might eventually be obliged to allow male officers to read the same sort of thing in female facilities. Commenter contends that pornography is almost invariably directly linked to sex offenders in Europe and the commenter finds it rather difficult to accept that the same trend does not apply in the United States.

Accommodation: None.

Response C: Department contends that this is a general statement and opinion, and no reasonable response is necessary.

COMMENTER #31:

Comment A: Commenter contends that if implemented, the policy would be a punitive action against inmates who are not harassing staff or other inmates.

Accommodation: None.

Response A: See Commenter #3, Response A.

Comment B: Commenter asks why the emphasis in the rule change is on "female staff." Commenter contends that male staff have been harassed too and that the language is biased and based on stereotypes. Commenter contends that male inmates can sexually harass male guards and female inmates can sexually harass female guards. Commenter contends that the wording should be gender-neutral.

Accommodation: None.

Response B: Department contends that it is committed to providing a workplace in which all individuals, male and female, are treated with respect and professionalism, and to provide a workplace that is

free from all forms of discrimination and harassment, including sexual harassment. The Department contends sexual harassment is described as behavior that rises to the level of sexual harassment in violation of Title VII of the Civil Rights Act of 1964 and the Fair Employment and Housing Act. Additionally, departmental employees are afforded the right to apply for positions throughout the Department, and custody staff is subject to the post and bid process when applying for positions throughout the institutions/facilities.

Comment C: Commenter contends that barring sexually explicit materials could actually make matters worse. Commenter contends that psychiatric experts should be consulted. Commenter contends that suppressing materials could actually create additional or greater problems with the inmate population. Commenter suggests that after 6 months, if the harassment remains, the Department should revisit these policies.

Accommodation: None.

Response C: Department contends that these regulations were filed to aid in the legitimate penological interests of maintaining the safety and security of the prisons. These regulations will also aid in rehabilitating inmates, reducing sexual harassment of correctional officers and prevent a hostile work environment. The Department also contends that the prison environment will not worsen due to these regulations, nor will inmates suffer, but will in fact be in a safer environment due to the fact that unrestricted access to sexually explicit material could lead to bartering between inmates and anatomical comparisons could lead to fights between inmates thereby jeopardizing the safety of inmates or prison staff. Additionally, the Department provides a broad range of mental health services to inmates by assessing the needs of its population and developing specialized programs of mental health care to the extent resources are available for this purpose.

COMMENTS #32: (FORM LETTER #22, 26, 27, 32, 33, 34, 35)

Comment A: Commenter contends that he objects to the regulation and that the Department has not considered other alternatives. He contends that the Department should place female officers who have problems with seeing nude photos at the women's prisons. He contends that would take care of two problems, one being taking men out of the sensitive areas of the women's prison would cut down on rapes and sexual harassment of women prisoners and it would put female officers there and remove them from men's prisons.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations. He contends that this regulation is as foolish as the lawsuit recently filed against the fast food companies blaming the fast food companies for making the customers obese. He contends that it is the female guard's personal choice to work in the men's prison. He further contends that female guards wear tighter uniforms than any visitor would ever be allowed to wear into a visiting room and that if a male inmate complains he is laughed at or ignored. He contends that CCPOA okays this type of behavior as a "perk of the job." He contends that guards are rarely disciplined for any infractions of this kind. He questions departmental training of guards about openly watching the opposite sex prisoners shower.

Accommodation: None.

Response B: See Commenter #3, Responses C and D.

Comment C: Commenter contends that the Department offers the inmates "alternate means of exercising their constitutional right to receivesexually explicit letters...." He contends that an inmate could sexually harass a female guard after reading a letter too, so why are photos singled out? He contends that this is inconsistent with the reasons given for changing the rules.

Accommodation: None.

Response C: See Commenter #22, Response C.

Comment D: Commenter contends that the Department creates violence among inmates by taking away every avenue of venting anger and frustration. He contends that if the Department keeps taking

away some of the positive ways of venting (family visits and weights), then there could be another Attica and there could be more riots, fights and escapes.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #33: (FORM LETTER #22, 26, 27, 32, 33, 34, 35)

Comment A: Commenter contends that she objects to the regulation and that the Department has not considered other alternatives. She contends that the Department should place female officers who have problems with seeing nude photos at the women's prisons. She contends that would take care of two problems, one being taking men out of the sensitive areas of the women's prison would cut down on rapes and sexual harassment of women prisoners and it would put female officers there and remove them from men's prisons.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations. She contends that this regulation is as foolish as the lawsuit recently filed against the fast food companies blaming the fast food companies for making the customers obese. She contends that it is the female guard's personal choice to work in the men's prison. She further contends that female guards wear tighter uniforms than any visitor would ever be allowed to wear into a visiting room and that if a male inmate complains he is laughed at or ignored. She contends that CCPOA okays this type of behavior as a "perk of the job." She contends that guards are rarely disciplined for any infractions of this kind. She questions departmental training of guards about openly watching the opposite sex prisoners shower.

Accommodation: None.

Response B: See Commenter #3, Responses C and D.

Comment C: Commenter contends that the Department offers the inmates "alternate means of exercising their constitutional right to receivesexually explicit letters...." She contends that an inmate could sexually harass a female guard after reading a letter too, so why are photos singled out? She contends that this is inconsistent with the reasons given for changing the rules.

Accommodation: None.

Response C: See Commenter #22, Response C.

Comment D: Commenter contends that the Department creates violence among inmates by taking away every avenue of venting anger and frustration. She contends that if the Department keeps taking away some of the positive ways of venting (family visits and weights), then there could be another Attica and there could be more riots, fights, and escapes.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #34 (FORM LETTER #22, 26, 27, 32, 33, 34, 35)

Comment A: Commenter contends that she objects to the regulation and that the Department has not considered other alternatives. She contends that the Department should place female officers who have problems with seeing nude photos at the women's prisons. She contends that would take care of two problems, one being taking men out of the sensitive areas of the women's prison would cut down on rapes and sexual harassment of women prisoners and it would put female officers there and remove them from men's prisons.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations. She contends that this regulation is as foolish as the lawsuit recently filed against the fast food companies blaming

the fast food companies for making the customers obese. She contends that it is the female guard's personal choice to work in the men's prison. She further contends that female guards wear tighter uniforms than any visitor would ever be allowed to wear into a visiting room and that if a male inmate complains he is laughed at or ignored. She contends that CCPOA okays this type of behavior as a "perk of the job." She contends that guards are rarely disciplined for any infractions of this kind. She questions departmental training of guards about openly watching the opposite sex prisoners shower.

Accommodation: None.

Response B: See Commenter #3, Responses C and D.

Comment C: Commenter contends that the Department offers the inmates "alternate means of exercising their constitutional right to receivesexually explicit letters...." She contends that an inmate could sexually harass a female guard after reading a letter too, so why are photos singled out? She contends that this is inconsistent with the reasons given for changing the rules.

Accommodation: None.

Response C: See Commenter #22, Response C.

Comment D: Commenter contends that the Department creates violence among inmates by taking away every avenue of venting anger and frustration. She contends that if the Department keeps taking away some of the positive ways of venting (family visits and weights), then there could be another Attica and there could be more riots, fights, and escapes.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #35 (FORM LETTER #22, 26, 27, 32, 33, 34, 35)

Comment A: Commenter contends that she objects to the regulation and that the Department has not considered other alternatives. She contends that the Department should place female officers who have problems with seeing nude photos at the women's prisons. She contends that would take care of two problems, one being taking men out of the sensitive areas of the women's prison would cut down on rapes and sexual harassment of women prisoners and it would put female officers there and remove them from men's prisons.

Accommodation: None.

Response A: See Commenter #3, Response C.

Comment B: Commenter contends that female guards who feel harassed by frontal nudity should be responsible enough to bid for jobs or be assigned to jobs where they are not exposed. Commenter further contends that female guards should understand when hired for a correctional officer position, they may be exposed to frontal nudity and possible hostile situations. She contends that this regulation is as foolish as the lawsuit recently filed against the fast food companies blaming the fast food companies for making the customers obese. She contends that it is the female guard's personal choice to work in the men's prison. She further contends that female guards wear tighter uniforms than any visitor would ever be allowed to wear into a visiting room and that if a male inmate complains he is laughed at or ignored. She contends that CCPOA okays this type of behavior as a "perk of the job." She contends that guards are rarely disciplined for any infractions of this kind. She questions departmental training of guards about openly watching the opposite sex prisoners shower.

Accommodation: None.

Response B: See Commenter #3, Responses C and D.

Comment C: Commenter contends that the Department offers the inmates "alternate means of exercising their constitutional right to receivesexually explicit letters...." She contends that an inmate could sexually harass a female guard after reading a letter too, so why are photos singled out? She contends that this is inconsistent with the reasons given for changing the rules.

Accommodation: None.

Response C: See Commenter #22, Response C.

Comment D: Commenter contends that the Department creates violence among inmates by taking away every avenue of venting anger and frustration. She contends that if the Department keeps taking away some of the positive ways of venting (family visits and weights), then there could be another Attica and there could be more riots, fights, and escapes.

Accommodation: None.

Response D: See Commenter #3, Response D.

COMMENTER #36:

Comment A: Commenter contends that what she is going to say will not make her popular with families of prisoners nor with the Department. She states that men and women are two halves of a whole, each have the desirable hormones required to attract one another and that they enjoy looking at each other. She further contends that God only made two sexes and that male prisons are full of testosterone and female prisons are full of estrogen, that this regulation will cause a higher rate of homosexuality inside prisons.

Accommodation: None.

Response A: See Commenter #3, Response D.

Comment B: Commenter contends that the Department took Family Visits away and now they want to take away the only other natural outlet. She contends that religious/social morals are being inflicted on inmates. She contends that masturbation is a normal activity and that looking at pictures should be allowed if inmates do this in private.

Accommodation: None.

Response B: See Commenter #3, Response D.

Comment C: Commenter contends that anyone working in a single sex prison of the opposite sex, who is offended by the sight of their own sex should not be a guard. She contends that she is a former Officer and that as part of her job she had to observe inmates in showers, on the toilet, and perform strip searches. She contends that there are ways to handle and correct the problem. She states to just ignore it or create enough peer pressure to make the inmate stop.

Accommodation: None.

Response C: See Commenter #3, Response D.

Comment D: Commenter contends that Officers are also affected by high levels of hormones and she contends that this can be seen by the high rate of adultery and divorce rate among Correctional Officers. She contends that there is a large number of Officers having sex with other Officers and that this is how Officers get promoted or positions of higher rank and power in the system. She states that Headquarters overlooks this, but that the numbers of Officers who are terminated for “over familiarity with an inmates” is a closely guarded secret.

Accommodation: None.

Response D: See Commenter #3, Response D.

Comment E: Commenter contends that the Department is set on removing so many privileges from inmates that it will eventually set the prison population off and that means that more Correctional Officers will need to be hired.

Accommodation: None.

Response E: See Commenter #3, Response D.

Comment F: Commenter contends that female guards should be properly trained or removed from a male only prison into an environment she is comfortable in. She asks that if female guards are not comfortable viewing the nude bodies of the opposite sex, then why are they guards. She contends that it is because of the money guards get paid. She contends that the Department needs to hire more guards that are mature adults.

Accommodation: None.

Response F: See Commenter #3, Responses C and D.

COMMENTER #37:

Comment A: Commenter contends that the Department has abused the emergency statute clause when Administrative Bulletin (AB) 02/04 became immediately effective and prevented OAL review until after the effective date.

Accommodation: None.

Response A: See Commenter #4, Response A.

Comment B: Commenter contends that the Department has required the commenter to exhaust administrative remedies through the institution level first, when institutions cannot change AB 02/04 or the Notice of Change to Director’s Rules.

Accommodation: None.

Response B: See Commenter #3, Response D.

Comment C: Commenter contends that in the Mauro decision, the Petitioner failed to point out an alternative that accommodates his rights at de minimus cost to security interests; however, commenter contends that he has notified the Department of the alternatives via a Request for Determination to the OAL.

Accommodation: None.

Response C: Department contends that a copy of the Commenter's Request for Determination to OAL was sent to the Department. Additionally, the Department was notified that OAL had rejected the request because the Department duly adopted the regulations pursuant to the APA and that the Department had determined that no reasonable alternatives would be more effective in carrying out the purpose of this action or would be as effective and less burdensome to affected private persons than the action proposed. Also, the Department contends that inmates retain alternative means of exercising their constitutional right to receive sexually explicit communications.

Comment D: Commenter contends that the sexually explicit standard of Section 3006(c)(17) contradicts rights established under PC 2601(c).

Accommodation: None.

Response D: See Commenter #5, Response G.

Comment E: Commenter contends that sexually explicit standard of Section 3006(c)(17) should be reviewed under the "...taken as a whole..." standard of Section 3006(c)(15) so as not to be vague and in conflict with PC 2601(c).

Accommodation: None.

Response E: See Commenter #2, Response B.

COMMENTER #38:

Comment A: Commenter contends that the regulation does not meet the consistency standard because it does not comport with state law, specifically PC 2601. Commenter further contends that it is clear that many materials, which would be banned under the proposed regulation, are not legally obscene under constitutional standards. Commenter contends the new regulation would ban materials that are explicitly allowed by an existing Penal Code section. Commenter contends that while PC 2600 clearly give prison officials some discretion to restrict prisoner rights, the broad regulation proposed by the Department would not be found legal under that standard.

Accommodation: None.

Response A: Department contends that the Office of Administrative Law states that the Department met all APA standards pursuant to the filing of regulations, and duly adopted as a regulation pursuant to the APA (Title 1, CCR, sec. 123, subd. (b)). **Also, see Commenter #5, Response G.**

Comment B: Commenter contends that the regulations fails to meet the standards of necessity and non-duplication because there is not substantial evidence showing a need for the regulation and other regulations already address the Department's concerns. Commenter contends that although the Notice states that sexually explicit materials have caused an increase in verbal assaults, harassment and intimidation of female staff, and can lead to bartering and fights, there is no evidence to support these claims. Commenter also contends that the regulation is not necessary to address any actual concerns because regulations already prohibit prisoners from displaying sexually explicit materials or harassing staff. Commenter contends that CCR Sections 3008, 3004, 3315(a)(3)(O), 3323(f)(4) and 3323(f)(6) allow prison officials to punish those inmates who do not comply.

Accommodation: None.

Response B: See Commenter #3, Response A and Commenter #38, Response A.

Comment C: Commenter contends that the regulations appear to be unnecessary because California inmates have long been allowed to possess sexually explicit materials and the Department has never before taken action to ban them. Commenter contends that only a few years ago the Department did not find it necessary to ban all depictions of nudity. Commenter contends that in the Final Statement of Reasons for the 1996 regulations, the Department stated that it was not the intent of the regulations to prohibit sexually explicit material and that the 1996 regulation did not ban nude photos or pictorial representations of nudity.

Accommodation: None.

Response C: See Commenter #3, Response A.

COMMENTER #39:

Comment A: Commenter contends that if existing sections of the CCR were adhered to by inmates and enforced by staff, then the change in the regulations would be unnecessary. Commenter contends that staff “turn a blind eye,” to the existing policy and that is why problems arise. Commenter contends that staff should be trained in all areas of concern so that the violations will decrease.

Accommodation: None.

Response A: See Commenter #22, Response C. Also, Department contends that all departmental Peace Officers are required to attend ongoing training regarding the Department’s rules and policies.

Comment B: Commenter contends that this regulation is duplicative. Commenter contends that all regulations must follow the six standards of the APA, and this regulation violated the “non-duplication” standard.

Accommodation: None.

Response B: See Commenter #38, Response A.

COMMENTER #40:

Comment A: Commenter contends that boys as young as 18 can buy Playboy magazine and that most inmates are men, not boys. Commenter contends that this regulation is another example of rights being unjustly taken away from inmates.

Accommodation: None.

Response A: See Commenter #3, Response D and Commenter #5, Response G.

Comment B: Commenter contends that the Department states that there will be no cost or savings to any state agency. Commenter contends that if this is the case and female officers are not injured due to inmates becoming out of control due to viewing nudity, then why take the magazines away. Commenter contends that there will be an impact to business due to the loss of subscriptions.

Accommodation: None.

Response B: See Commenter #24, Commenter A. Also, see Commenter #16, Response B.

Comment C: Commenter contends that there are both men’s and women’s prisons and that women must realize that going into this profession they will be subject to all aspects of human conditions, “good, bad, and ugly.” Commenter contends that nude pictures of women should not be ban just because inmates are verbally abusive. Commenter contends that if female officers are offended then they should transfer to a position within the prison where they will not come into direct contact with inmates, transfer to a women’s prison, or change professions. Commenter contends that the Department cannot call it “sexual harassment” when an inmate, who is in a cage, says something lewd to a female officer. Commenter contends that the inmates can’t leave, but the female officer has the choice to work somewhere else if they expect to be treated with respect and consideration by an inmate.

Accommodation: None.

Response C: See Commenter #3, Response C.

Comment D: Commenter contends that banning magazines won’t change an inmate’s temperament.

Accommodation: None.

Response D: Department contends that the comment is made in the form of a general statement and is an unsubstantiated opinion and no reasonable accommodation on the part of the Department is possible.

Comment E: Commenter contends that prisons should have records of all incidents involving female guards being abused in this manner by inmates. Commenter contends that the Department should compare the records in six months and see if this regulation has improved anything.

Accommodation: None.

Response E: See Commenter #3, Response A.

Comment F: Commenter contends that inmates have received magazines depicting nudity for a long time, and all of a sudden the Department states it leads to bartering or comparisons? Commenter contends that it doesn’t sound as if statistics have been kept to prove that nudity is causing problems.

Accommodation: None.

Response F: See Commenter #3, Response A.

COMMENTER #41:

Comment A: Commenter contends that inmates and their loved ones have the right to exchange nude photos, particularly lifers who have no family visits, nor are they getting parole dates. These photos are precious to them and the commenter contends that they are not being displayed.

Accommodation: None.

Response A: See Commenter #3, Response D.

Comment B: Commenter contends it is against the rules to display these photographs, so any such actions that might occur are already covered by existing rules.

Accommodation: None.

Response B: See Commenter #3, Response D.

Comment C: Commenter contends if these things are offensive to female guards perhaps she should reconsider her career. Commenter contends it was the female's own choice to work in a men's prison.

Accommodation: None.

Response C: See Commenter #3, Response C.

Comment D: Commenter asks what is the Department going to do about men who have tattoos of naked women on their bodies? Is the Department going to tattoo clothing on the nude tattoos or cut them off the men and send them home?

Accommodation: None.

Response D: See Commenter #8, Response E.

COMMENTER #42:

Comment A: Commenter contends that in 1995 the Department changed regulations to restrict magazines, which were, in the Department's opinion, obscene. This created rules that were open to many interpretations of prison officials, and inmates were having to appeal these denials of their pictures, magazines, etc.

Accommodation: None.

Response A: See Commenter #2, Response B.

Comment B: Commenter contends that again we are facing the completed and total "Content Based" ban on "All" Frontal Nudity using the 9th Circuit Court Decision found in Maurao V. Arpario, which dealt with the policies of another state's County Jail System.

Accommodation: None.

Response B: See Commenter #6, Response D.

Comment C: Commenter contends that this change comes when there are more problems occurring with sexual harassment between male and female staff than with the purported incidents between inmates and female staff and this change is changing and amending state law Section 2601 et. seq.

Accommodation: None.

Response C: See Commenter #3, Response C. Also, Department contends that these regulations do not change or amend PC 2601.

Comment D: Commenter contends that the state legislature has not approved such a ban for rehabilitation of inmates which sounds great, except that more educational/self help/trades are being cut every year, the latest being the Arts In Corrections programs.

Accommodation: None.

Response D: See Commenter #3, Response D.

Comment E: Commenter contends that given the state's budget crises, the Department will spend more tax money to defend this regulation that is not based on any legitimate need or law.

Accommodation: None.

Response E: Department contends that as documented on the Fiscal and Economic Impact Statement, there is no cost to any state agency, nor does this regulation have any other non-discretionary cost or savings imposed on state agencies. Lastly, there is no cost or savings in federal funding to the state.

Comment F: Commenter contends that less costly alternatives to Department would be to amend CCR Section 3002, Obscenity, to include the verbiage "Frontal Nudity" with "posting, hanging." Commenter contends there is no rule violation for the act of sexually harassing a female officer and

if the Director were to place a “No Tolerance Sexual Harassment Rule” with repercussions for inmates, this behavior would stop.

Accommodation: None.

Response F: See Commenter #3, Response C and Commenter #42, Response E.

Comment G: Commenter contends that inmates making sexually harassing remarks towards female staff is unfounded and with no sexual outlet, such as adult magazines, the Department will have more incidents with sexual harassment.

Accommodation: None.

Response G: See Commenter #3, Responses A and C.

Comment H: Commenter contends that when this plan fails as the first one in 1995, the Department will disallow any inmate from writing or reading anything containing sexually explicit material

Accommodation: None.

Response H: See Commenter #3, Response D.

COMMENTS #43:

Comment A: Commenter contends that he is a 24 year-old male doing a 25-year to life sentence at PBSP and he began his sentence at 18 as an adult but is treated like a child in prison. He contends that he cannot watch “R” rated movies, nor is he allowed to smoke, or have Family Visits. He contends that he is told what time to shower, eat, etc.

Accommodation: None.

Response A: See Commenter #3, Response D and Commenter #5, Response G.

Comment B: Commenter contends that men will not stop masturbating, or stop harassing staff, female or otherwise, because the Department is taking away nude pictures. He contends that this regulation will make everybody more sexually frustrated and that it will promote homosexual activities. He contends that he has never, in six years of incarceration, heard an inmate verbally assault female staff in connection with sexually explicit material. He contends that there could be a few isolated incidents where inmates who are not right in their minds say things, but he contends that won’t change.

Accommodation: None.

Response B: See Commenter #3, Responses A and C.

Comment C: Commenter contends that there are already rules in place to prevent and deal with the harassment of male or female officers. Commenter contends that Section 3314(a)(3)(I) deals with the use of vulgar or obscene language, Section 3008 deals with hanging nude pictures, Section 3315 deals with serious rule violations regarding disrespect, violence, or harassment. Commenter contends that the Department has not been enforcing these rules and that the whole inmate population should not be punished as a result.

Accommodation: None.

Response C: See Commenter #2, Response B, Commenter #3, Response C, and Commenter #5, Response D and E.

Comment D: Commenter contends that this regulation is little more than a thinly veiled ban on obscenity. Commenter asks how will this regulation aid in the legitimate penological interests of maintaining the safety and security of the prisons, and how many riots or escapes have been contributed to looking at nude pictures.

Accommodation: None.

Response D: See Commenter #2, Response B, and Commenter #3, Responses A and B.

Comment E: Commenter contends that over the past decades the Department has made numerous cuts to rehabilitation type programs such as alcohol and drug programs, anger management programs, and various trades, however, he asks how will taking away nude photos rehabilitate inmates? He contends that inmates who have life sentences don’t need rehabilitating because they are never getting out, and when inmates do get out of prison, are they going to revert to criminal behavior just because they look at nude magazines.

Accommodation: None.

Response E: See Commenter #3, Response A and Commenter #10, Response D.

Comment F: Commenter contends that this regulation may not cost the State anything to implement but in the long run it could cost a substantial amount because there will be lawsuits and court battles for years to come.

Accommodation: None.

Response F: See Commenter #42, Response E.

Comment G: Commenter contends that if the Department keeps taking away from people who have nothing, then they don't care and they will become more dangerous because there is nothing to control them with.

Accommodation: None.

Response G: See Commenter #3, Response D.

COMMENTER #44:

Comment A: Commenter contends that if a female officer has such a delicate sensibilities that she would be offended by a photograph depicting frontal nudity, then she should not be working in custody in a men's facility.

Accommodation: None.

Response A: See Commenter #3, Response C.

ITEM 13

ADDENDUM TO FINAL STATEMENT OF REASONS

The following Comments have no change to the summary or accommodation. The responses have been augmented and/or amended as follows. The Department's amended responses are underlined.

Commenter #4

Response B: In the hearing held in Tuolumne County, James Michael Munro vs. David Tristan et.al., the Judge did not make any rulings. On December 16, 2002, the Judge took the issue and the pleadings under submission and will render a ruling some time in the future. The Magistrate in this case has recommended that this case be dismissed. The District Court has yet to adopt that recommendation. Furthermore, the inmate has not filed an objection to this recommendation. The Court in Tuolumne County, however, has denied a similar motion in a different case, Thomas vs. Alameida, et. al., Case No. CV49151. The Court found that the certification of the operational needs substantially comply with Penal Code 5058.3 and meet the minimum constitutional standards discussed in Mauro, supra. This decision is being added in order to respond to comments and is incorporated by reference into this Addendum to the Final Statement of Reasons.

Commenter #5

Response B: Department contends that regulations were duly adopted on September 30, 2002, pursuant to the APA (Title 1, CCR, Section 123, subd. (b)). The Director of the Department is authorized to enforce regulations filed pursuant to 5058.3.

The amended Department response is as follows:

In Commenter #5, Response B and in other places throughout the FSOR the Department stated that the regulations were duly adopted pursuant to the APA in Title 1, CCR, Section 123, subd. (b). The corrected reference in Commenter # 5, Response B and in all other places with the same response throughout the FSOR should be "pursuant to Government Code, Section 11340 et. seq."

Commenter #5

Response D: Department contends that since regulations giving broad discretion to prison authorities were appropriate where regulations concerned materials coming into a prison, and moreover, the regulations actually grant little discretion to

mailroom staff, who are simply required to determine whether the material in question contain frontal nudity that is not allowed pursuant to the emergency regulations. The Department further contends that the following cases: *Miller v. California*, 93 S. Ct. 2607 (1973); *Pell v. Procunier*, 417 US. 817 (1974); *Thornburgh v. Abbot*, 104 Ld. 2d 459 (1989; and *Broulette v. Starns*, 161 F. Supp. 2d. 1021 (2002) are cases that are not on point. These cases deal with obscenity. Penal Code (PC) Section 311 provides the statutory definition of obscene material. As stated in 3006(c)(15), obscene material, taken as a whole, depicts or describes sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value. It further states that when obscene material appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it appeals to deviant sexual groups. Sexually explicit images are not obscene as defined in the PC and are not subject to the same test as obscene material. Also see Commenter # 6, Response D.

Commenter #6

Response A: See Commenter #5, Response G. The Department further contends that in *Broulette v. Starns*, 161 F. Supp. 2d. 1021 (2002) the case is not on point. This case deals with obscenity. Penal Code (PC) Section 311 provides the statutory definition of obscene material. As stated in 3006(c)(15), obscene material, taken as a whole, depicts or describes sexual conduct; and which, taken as a whole, lacks serious literary, artistic, political, or scientific value. It further states that when obscene material appears from the nature of the matter or the circumstances of its dissemination, distribution, or exhibition that it appeals to deviant sexual groups. Sexually explicit images are not obscene as defined in the PC and are not subject to the same test as obscene material.

Commenter #6

Response D: See Commenter #5, Response G. Department contends that the Supreme Court, in *Thornburgh v. Abbott*, 490 U.S. 401, 417 n. 15, 109 S. Ct. 1874, 104 L.Ed.2d 459 (1989), approved a regulation that permitted a federal prison warden to exclude any specific publication after the warden determined that it was “detrimental to the security, good order, or discipline of the institution.” The Court further explained that it was circumscribed by the requirement that “no publication may be excluded unless the warden himself makes the determination.” The Director of the Department has designated authority to departmental staff to make such determinations. The Department further contends that this case deals with obscenity and is not on point. See Commenter # 6, Response A above.

Commenter #7

Response B: See Commenter #5, Response D. Also, Department contends that this regulation ensures consistency in the exclusion of materials. The Commenter stated that a reading of the Wisconsin ban on sexually explicit material was enclosed. This material was not enclosed in the Commenter’s letter.

Commenter #9

Response D: See Commenter #3, Responses C and D. Also, Department contends that pursuant to Department Operations Manual, correctional personnel shall not conduct unclothed body searches of an inmate of the opposite sex, except by qualified medical staff, or in the case of an emergency. These procedures are also stated in Title 15, Section 3287(b)(1). This section is specific as to cell, property and body inspections performed by departmental staff.

Commenter #10

Response B: Department contends that the regulations were filed in compliance with the APA. Pursuant to the APA the Department must allow any person to submit written comments regarding the regulations. The Notice of Change to Director's Rules 02/10 was issued on October 1, 2002, which began the 45-day comment period for these regulations. A Public Hearing was held on December 18, 2002, which concluded the Public Comment Period. All comments are summarized and responded to in the Final Statement of Reasons. There are no Statutes that require the Department to consult with the CCPOA, however, Bargaining Unit 6's Memorandum of Understanding states that the Department shall consult with the Unions regarding working conditions of peace officers. Via the NCDR 02/10 the CCPOA was notified of the proposed regulations. The CCPOA did not comment on this proposed regulation.

Commenter #12

Response B: Department contends that NCDR 02/10 is not a duplicate of the emergency regulation filed with OAL, but is a requirement of the APA when an agency begins the process of promulgating regulations. The NCDR 02/10 consists of the Department's informational cover sheet, the Notice of Adoption of Emergency regulations, the Text of the emergency regulations and the Initial Statement of Reasons. NCDR 02/10 is the official notification of the Public Hearing that took place on December 18, 2002. NCDR 02/10 was issued on October 1, 2002, which began the 45-day Public Comment Period as required by the APA. Additionally, see Commenter #4, Response A. There is no APA requirement that requires the Department to further notify the Commenter beyond the initial notification, which the Commenter received and commented upon. See Commenter #4, Response B above.

Commenter #14

Response C: See Commenter #5, Responses E, F, and G. Additionally, the Department contends that the text stating "the exposed female breast" meets the Clarity standards. This is a commonly used term throughout today's

society. This text is written in such a manner so that those persons directly affected by them easily understand the meaning.

Commenter #15

Response A: See Commenter #1, Response A, Commenter #2, Response B and Commenter #5, Response B. Also, the Department contends that these regulations will be enforced through administrative disciplinary methods. Additionally, the Department contends that this regulation is necessary because inmates subject correctional officers at the institutions with a daily barrage of unwarranted sexual advances. Inmates often post sexually explicit pictures in their cells that can be viewed by officers when they perform cell searches. Many officers are intimidated by this, which creates a hostile work environment when the officers are performing routine duties. Also, this regulation allows departmentally purchased or acquired educational, medical/scientific, or artistic material that contains frontal nudity because the Department has determined this specific material has an educational value or purpose. Additionally, flexibility is needed in case there are situations where frontal nudity in pictorial format may be allowed on a case-by-case basis when approved by the Institution Head or their designee.

Commenter #15

Responses G, H and K: See Commenter #3, Response C, Commenter #5, Responses B, E, F, and G. Also, Department contends that the Office of Administrative Law states that the Department met all APA standards pursuant to the filing of regulations, and duly adopted as a regulation pursuant to the APA (Title 1, CCR, sec. 123, subd. (b)).

The amended Department response is as follows:

In Commenter #5, Response B and in other places throughout the FSOR the Department stated that the regulations were duly adopted pursuant to the APA in Title 1, CCR, Section 123, subd. (b). The corrected reference in Commenter # 15, Responses G, H and K, and in all other places with the same response throughout the FSOR should be “pursuant to Government Code, Section 11340 et. seq.”

Commenter # 15

Response I: See Commenter #3, Response D. Commenter objects to Title 1, CCR, 16(a)(14) as grammatically incorrect. However, this is not CDC’s regulation, but is actually under the authority of the Office of Administrative Law; therefore, this comment is outside the scope of this rulemaking package.

Commenter # 15

Response J: See Commenter #5, Responses B, E, F and G. Additionally, the Department contends that in *Turner v. Safley*, 482 U.S. 78 (1987) the Department has valid penological interest that is rationally related to promulgating regulations and therefore this regulation is Constitutionally sufficient under both the Federal and California Constitutions.

Commenter # 15

Response K: Department contends that regulations were duly adopted on September 30, 2002, pursuant to the APA, Government Code, Section 11340 et. seq. The Office of Administrative Law reviewed the emergency regulations and found that all APA required standards were met. See Commenter #5, Response B above in the amended departmental response. Also, the *Mauro* decision does not mandate that the Department carry out the decision; however, the decision does provide the test for constitutionality. The Department adopted the ban on frontal nudity in pictorial format because of valid penological interests.

Commenter # 16

Response J: Department contends that inmates who are in an educational setting and studying authorized and approved educational, medical/scientific, or artistic material are less likely to view the educational material as sexually explicit than unauthorized material that has been prohibited that depicts frontal nudity of either gender, in an adult magazine, a nude photograph or drawing, etc. **See Commenter #9, Response D.** The Department also contends that in Section 3007, there are existing regulations, which prohibit the participation of inmates in illegal sexual acts. Inmates are specifically excluded in laws, which remove legal restraints from acts between consenting adults. Inmates must avoid deliberately placing themselves in situations and behaving in a manner, which is designed to encourage illegal sexual acts. Additionally, the Commenter is describing frontal nudity that may occur in a real setting, not in print. The Department contends that the regulation bans frontal nudity in print. The regulation bans frontal nudity, including the genitalia, of either gender and therefore does not discriminate towards heterosexuals nor does it treat them differently from inmates who prefer their own sex.

Commenter # 16

Response O: Department contends that this comment is aggregated and summarily dismissed because it is made in the form of a general statement, is unsubstantiated, and no reasonable accommodation on the part of the Department is possible. See Commenter #5, Response D above.

Commenter #17

Response A: Department contends that this regulation states that sexually explicit images that depict frontal nudity whether in the form of personal photographs, drawings, magazines, and/or pictorials shall be considered as contraband and that inmates shall not be allowed to possess such materials. **Also, see Commenter #5, Responses D and E.** Additionally, the Department has chosen to promulgate regulations addressing the issue of “frontal nudity.” In keeping with the recent 9th Circuit Court decision (*Mauro v. Arpaio*, 188 F.3d 1054, 9th Cir. 1999) which upheld the constitutionality of a correctional policy prohibiting prisoners from possessing sexually explicit materials that showed frontal nudity of either gender, including the exposed female breast(s) and/or the genitalia of either gender, because the policy was reasonably related to a legitimate penological interest. The Department contends that frontal nudity is the main issue that correctional staff must address at the individual institutions.

Commenter # 18

Response A: **See Commenter #3, Response D.** **Also,** the Department contends that pursuant to CCR, Article 3, Work and Education, inmates are obligated to work or participate in vocational, therapeutic, educational, or other institution program assignment, while committed to the custody of the Director of Corrections. Additionally, see Commenter #19, Response B.

Commenter # 19

Response E: **See Commenter #19, Response B.** **Also,** Department contends that the “Bill of Attainder” does not apply in this case as it is not singling out a specific group of inmates, the regulations applies to all inmates equally. Additionally, the Department contends that inmates still retain their Constitutional Rights, but, however, there are limits under PC 2600 and 2601, and therefore this regulation is not prohibited by the Bill of Attainder clause of the U.S. Constitution.

Commenter # 19

Response F: **See Commenter #19, Response B.** In *Turner v. Safley*, 482 U.S. 78 (1987) the US Supreme Court found that when prison regulations impinge on inmates’ constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interest. This regulatory ban on frontal nudity in print would pass the Turner Test.

Commenter # 21

Response A: **See Commenter #1, Response A.** Additionally, the Commenter refers to a recent study suggesting that pornography and gender equality both flourish in

politically tolerant societies. The Department contends that the Commenter did not furnish a copy of the “study” and therefore the Department is not able to access the information provided by the “study.” Nor did the Commenter make clear whether the “study” was regarding prison population. The Department contends that even if the “study” was specific to prison population, without a copy the Department cannot determine if the study is valid or relevant.

Commenter # 23

Response B: See Commenter #2, Response B and Commenter #3, Response A. Additionally, see Commenter # 5, Response D.

Commenter # 29

Response F: See Commenter #3, Response A. Also, Department contends that this comment is made in the form of a general statement, and is an unsubstantiated opinion and therefore no reasonable response can be made. Additionally, the Department contends that the Commenter did not attach a copy of the study by the Presidential Commission on Obscenity and Pornography. The Department contends that this study was apparently part of President Nixon’s 1970’s Presidential Staff Materials. The Commenter did not make clear whether the study was regarding prison population. Also, regarding the study at Atascadero State Hospital, the Commenter did not make clear whether this study was regarding a Government Hospital or an institutional setting. The Commenter did not provide specific situation and because the study was not attached, the Department was unable to confirm the relevancy of the study to the Frontal Nudity regulation.

Commenter # 31

Response A: See Commenter #3, Response A. Additionally, see Commenter #3, Responses B and C.

Commenter # 37

Response B: See Commenter #3, Response D. Additionally, the Department contends that this comment deals with the appeal process, which is not part of the rulemaking process.

The following Comment from Commenter #29 was not summarized nor responded to in the initial FSOR. Following is the Department's summary and response to Commenter #29.

Commenter #29

Comment I: Commenter contends that an attached declaration of an acknowledged expert filed in the US District Court for the Western District of Wisconsin. He contends that although the plaintiffs did not prevail in this or other litigation based upon a First Amendment theory, he contends that it seems clear that the proposed regulation, unless justified by legitimate penological reasons, is inconsistent with Penal Code 2601. He contends that numerous decisions have held that the counterpart to the First Amendment in the California Constitution affords greater protection than the Federal Constitution.

Response I: Department contends that the District Court of Wisconsin case did not prevail and therefore has no relevancy with the Department promulgation of these specific regulations. The Department further contends that these regulations are justified pursuant to PC 2600 and 2601 due to legitimate penological interest. This regulation will aid in the legitimate penological interests of maintaining the safety and security of the prisons, rehabilitating inmates, reducing sexual harassment of correctional officers and preventing a hostile work environment. Sexually explicit materials, within the institutions, have contributed to an increase of verbal assaults and have lead to intimidation of female correctional staff when attempting to perform cell searches. Additionally, numerous decisions have upheld the Departments authority to promulgate regulations due to legitimate penological interests.